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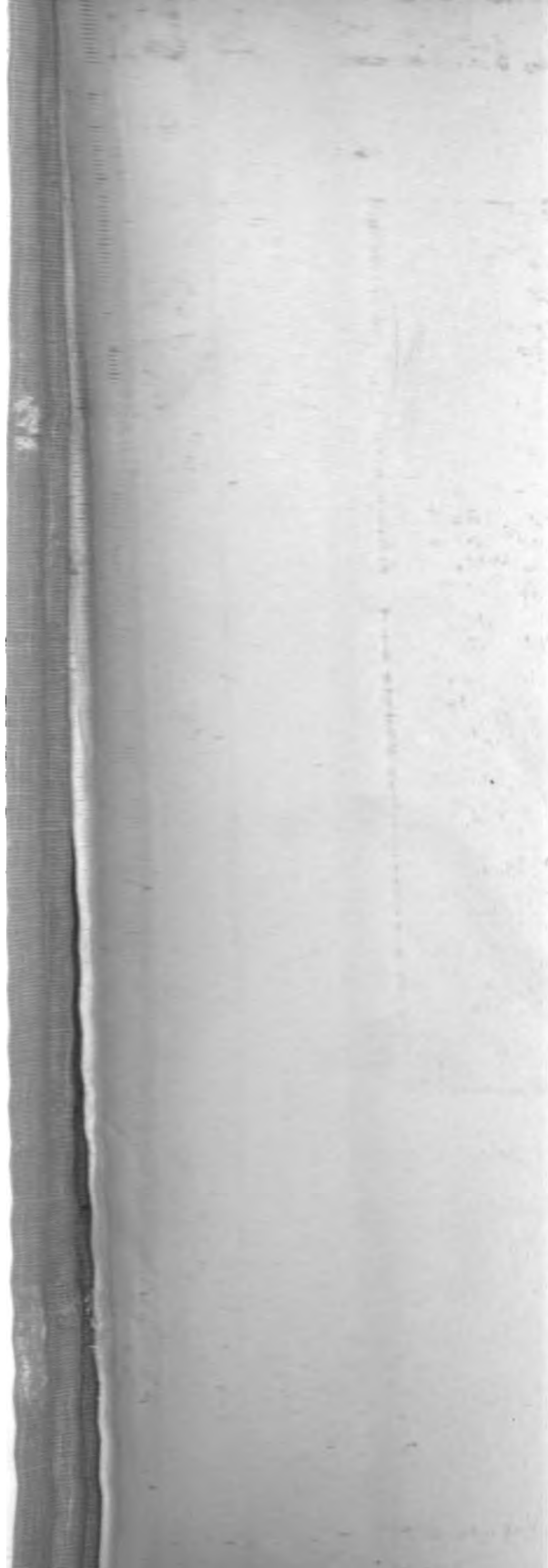


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FORMS OF CODE PLEADING

FOR
NEBRASKA, KANSAS AND OKLAHOMA

FULLY ANNOTATED

BY
WILLIAM S. CAMPBELL
OF THE ST. LOUIS BAR
AUTHOR OF FORMS OF CODE PLEADING FOR MISSOURI AND ARKANSAS

IN TWO VOLUMES

VOL. II
FORMS 549 TO 1074
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509. Allegation of negligence in furnishing defective appliances.
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513. Allegation of negligence in an action by firemen injured by engine separating from tender.
514. Allegation of master's negligence due to explosion of nitro-glycerine used by servant in mining.
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- 522. Action to foreclose a mechanic's lien and asking for priority over other encumbrances.
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- 524. Action to enforce a mechanic's lien for work and labor furnished by a contractor with the owner, a large part of claim being for extra work.
- 525. Allegations in an action to enforce a mechanic's lien for materials sold to the owner, where the building was sold before it was completed.
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- 553. Action against a city for damages for an injury from a fall on an alleged defective walk.
- 554. Action for damages for personal injuries resulting in the death of the infant son of plaintiff, by reason of a defective sidewalk.
- 555. Action for damages by wife for injuries caused by fall upon an alleged defective sidewalk, also assigned cause of action for loss of services and medical attention.
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- 559. Allegations of notice of defect required to be filed with the city five days before occurrence of injury. (Nebraska.)
- 560. Allegations of notice in writing of time and place where injury was received and nature of injury (Nebraska).
- 561. Allegations of negligence in action against a city for damages caused by falling from a sidewalk into creek, no guard or protection being provided.
- 562. Allegations in action for damages for injuries caused by falling on a defective sidewalk.
- 563. Allegations in action against city for damages caused by the alleged negligence in allowing timbers to be strewn upon the street, causing plaintiff to be thrown from her buggy and seriously injured.
- 564. Allegations of negligence in an action for damages caused by plaintiff driving into a ditch in a city street.

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- 565. Allegations of negligence in an action for damages caused by a defective sidewalk.
 - 566. Allegation of negligence in an action against a city for damages for personal injuries received on sidewalk.
 - 567. Action for damages for personal injuries received by reason of the alleged defective condition of a sidewalk.
 - 568. Action for damages for personal injuries resulting from a fall on a defective sidewalk.
 - 569. Allegations of negligence in action against a city for damages alleged to have resulted from being struck by a bill board blown down by a strong wind.
 - 570. Allegations in action for damages resulting from precipitation of water and sewage upon plaintiff's property.
 - 571. Allegations of negligence in an action for damages for injury resulting from defective sidewalk.
 - 572. Allegations in action against city from which notice to city may be inferred.
 - 573. Action for damages on account of injuries received at the hands of a mob (Kan. Gen. Stat. 1909, sec. 2933).
 - 574. Action against a city on a bond issued against a lot for special improvements.
 - 575. Action against a municipal corporation for damages for injuries arising from defective sidewalk.
 - 576. Allegation of negligence for damages due to defective sidewalk.
 - 577. Allegations of defective construction of sidewalk and allowing it to become and remain in a condition unsafe for use.
 - 578. Allegations of negligence in action for damages for injury from falling in unguarded hole existing alongside the sidewalk.
 - 579. Petition for personal injuries by driver of wagon being thrown therefrom by reason of a defective street.
549. ACTION FOR DAMAGES BY REASON OF INJURIES RECEIVED IN FALLING OVER A HYDRANT ALLEGED TO HAVE BEEN WRONGFULLY AND NEGLIGENTLY BUILT IN THE SIDEWALK.

Comes now G. R., plaintiff herein, and complains of the city of O. C. in said county and state, and for cause of action says:

That the said city of O. C. is now, and on the day of, 19.., was, and for a long time prior thereto, to-wit, more than five years, had been a city of the first class under the laws of the State of, and that on said day of, 19.., there was a certain sidewalk located on the north side of M. street, between B. and R. streets in said city; that said M. street and said walk

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were a common thoroughfare in said city, and that on said sidewalk above described between said B. and R. streets, there was on the day of, 19.., a certain upright post or structure called a hydrant, about twenty-two inches high, and standing at a point in said sidewalk about forty inches from the south edge of said sidewalk, which said hydrant had been negligently and wrongfully built in said sidewalk, and on said day of, 19.., and for a long time prior to said date, to-wit, for more than one year, had been wrongfully and negligently there maintained by said city, and which hydrant was then and there an obstruction in said sidewalk, and an obstruction to the due and proper use of said sidewalk.

Plaintiff says that while he was walking on said sidewalk on the night of the said day of, 19.., as he lawfully might do, and while exercising due and proper care, and without fault on his part he stumbled on and over said hydrant and then and there fell on said sidewalk, said fall then and there being caused by the wrongful and negligent erection and maintenance of said obstruction in said sidewalk as aforesaid, and this plaintiff was by said fall greatly and permanently injured, having his right arm broken near the wrist joint thereof, and being greatly bruised and injured on the right side of his body and seriously injured internally, so that he then did, since continually has, and now does suffer great pain, and has lost the use of his right arm and hand, and has been wholly unable to pursue his usual avocation and has been compelled to and has expended a large sum of money, to-wit, the sum of dollars, in caring for and endeavoring to cure his said injuries.

Plaintiff says that on the day of, 19.., he presented to the mayor and council of said city a claim against said city in the sum of dollars for said injuries, and demanded payment thereof, and that said mayor and council refused and still refuse to pay the same or any part thereof.

Wherefore, plaintiff says that by reason of said injuries so wrongfully and negligently caused by the said city of O. C.,

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he has been damaged in the sum of dollars, for which sum with his costs herein expended, he prays judgment.¹

550. ACTION FOR DAMAGES FOR PERSONAL INJURIES SUSTAINED BY REASON OF A DEFECTIVE SIDEWALK.

Comes now the plaintiff U. J. T., and complains of the defendant the town of N., a municipal corporation, and for her cause of action against said defendant alleges:

1. That the said defendant was at all times hereinafter mentioned and now is a municipal corporation duly created, acting and existing under and by virtue of the laws of the State of Oklahoma.

2. That on or about , 19.., and for some time prior thereto, there was a sidewalk along the east side of block adjacent to and along the east side of lot of said block and on the west side of P. avenue, between D. street and T. street in said town of N., C. county, Oklahoma, composed of boards and timbers, which sidewalk was used to a great extent by the citizens of said town of N., and the public in general, and that it was the duty of said defendant, the town of N., to maintain and keep said sidewalk in good repair; that the same was under the care and control of said defendant; that said defendant neglected and allowed said sidewalk to become and remain out of repair in such a manner that the boards and timbers used in the construction of the same, on or about the day of , 19.., and for some time prior thereto to become rotten and decayed, the boards on same became detached from the timbers on which they were nailed, thereby making it dangerous for pedestrians to pass over it, all of which defendant well knew, and on or about said day of , 19.., the plaintiff not being aware of the dangerous condition of said sidewalk was walking and passing over the same and by reason of the condition of said sidewalk which was caused by the gross neglect of said defendant to keep the same in good repair and in passable condition, the plaintiff without any fault on her part, was tripped by a loose

¹ From form in record in Oklahoma City v. Reed, 17 Okla. 518.

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board, same being a part of said sidewalk, and was thrown down on and against said sidewalk and the ground and without any fault or neglect on her part was greatly and permanently injured by having both of her arms broken by said fall to her great damage in the sum of dollars.

3. That on account of said injury said plaintiff has suffered great distress of body and mind to her great damage, to-wit: in the sum of dollars.

4. That the plaintiff on account of her said injury has become permanently injured in this, to-wit: by the loss of the use of her right arm entirely and her general health having become greatly impaired to her damage, to-wit: in the sum of dollars.

5. That on account of said injury the plaintiff was for some time sick, thereby being compelled to employ medical attendance, nurses, to purchase medicine, and other expenses in attempting to effect a complete recovery, thereby being damaged, to-wit: in the sum of dollars.

6. That on the day of, 19.., the plaintiff presented to the board of trustees of said town of N. her itemized claim in writing for allowance by said board of trustees for the amount hereinbefore set out, which claim was by said board of trustees of said town of N. wholly rejected and disallowed.

Wherefore, for all the causes and damages above set out and stated, the plaintiff prays for a judgment against the defendant in the sum of dollars costs of this action, and all other relief as seems to the court equitable and just.²

551. ALLEGATIONS OF UNSAFE CONDITION OF SIDEWALK.

Plaintiff states that on the said day of, 19.., the plaintiff was lawfully walking along the said sidewalk, at the place above set out and described, at which place the defendant corporation had negligently permitted the planks of which said sidewalk was constructed to become broken and unfastened from their lateral support, and to become unsafe and dangerous for passage of persons using said

² From form in record in *Norman v. Teel*, 12 Okla. 69.

sidewalk, and which sidewalk the defendant corporation negligently allowed to remain in such dangerous and unsafe condition.³

552. ACTION FOR DAMAGES FOR INJURIES RECEIVED BY INFANT GETTING HIS FOOT CAUGHT IN A HOLE IN A SIDEWALK.

A. S. R. alleges and shows to the court that he is the father of G. A. R., a minor of eleven years of age, and that he brings this suit on behalf of and as the next friend of his son G. A. R., and hereby complains of the defendant for that the defendant is now and was at all times mentioned in this petition a city of the metropolitan class; that O. street is a public street in said city duly laid out, running east and west, and in use by the public.

That a portion of said street, to-wit: a strip fifteen feet wide of the northern part is set aside for sidewalk purposes; that a long time prior to the happening of the injuries hereinafter mentioned there had been constructed by

³ Form in *Guthrie v. Finch*, 13 Okla. 496.

It was held under the allegations in this petition that the plaintiff might prove either that the defendant city had actual notice of such defective sidewalk, or that it had been out of repair for such length of time as to impute notice to the city. *Guthrie v. Finch*, 13 Okla. 496.

Allegations in action for material sold to a municipal township held sufficient in *Herring Lumber Co. v. Hazel Tp.*, 22 Okla. 102.

Presenting claim for damages for personal injuries to the city council. Statutes of Nebraska, Kansas, and Oklahoma, all provide that claims for unliquidated damages shall be presented to the city council before suit is brought, otherwise the city will not be liable for the costs of the action. *Cob. Ann. Stat. Neb.* 1911, secs. 8537 and 8961; *Comp. Laws of Okla.* 1909, sec. 703; *Gen. Stat. Kan.* 1909, sec. 1053.

Presenting the claim for damages to the city council for allowance is not a prerequisite to the commencement of a suit for damages against the city. *Bayard v. City of Franklin*, 87 Neb. 58; *Butterfield v. City of Beaver City*, 84 Neb. 417; see also *Nance v. Falls City*, 16 Neb. 85.

The statute does not require the presentation to the city council of a claim for damages for a personal injury sustained in consequence of a defective street or sidewalk of the city, and an appeal from the action of the council thereon. An original action may be maintained therefor in the district court. *Nicholson v. South Omaha*, 77 Neb. 710.

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the defendant on that portion of the street set aside for sidewalk purposes, between street and street, north and south streets in said city, a wooden sidewalk, which sidewalk between said street and said street, had, because of the neglect of said defendant become out of repair; the boards constituting said sidewalk had in some places decayed and rotted away; in other places boards had become loose and removed from said walk, while in other places the boards were broken and at a place in said sidewalk about feet east of street there was an opening, hole and aperture between the said boards forming the sidewalk at that place, which hole, aperture and opening had been and was caused by the said boards rotting and decaying and was about four inches in width, thereby forming a defect and dangerous place in said sidewalk, and the same rendered the said sidewalk dangerous to persons passing over and upon said sidewalk, and all of said conditions, including the last one mentioned, had been through the neglect of the city, allowed to exist for a long time, to-wit, for more than three months prior to the injuries hereinafter mentioned.

On the day of, 19.., the defendant was given actual notice in writing of the said condition of said sidewalk between and streets on the north side of this street, by a written notice left with the city clerk by one D J., a copy of which notice in writing is hereto attached marked "exhibit A" and made a part hereof, and notwithstanding said defendant was given the said notice it failed and neglected to repair the said sidewalk or cause the same to be done but negligently and carelessly allowed the same to remain in said dangerous condition.

On the day of, 19.., the said G. A. R., between the hours of seven and eight o'clock in the evening, was passing along upon said sidewalk between street and street on the north side of O. street, using due care and caution, and when he arrived at a point about feet east of street on said sidewalk where the said hole, aperture and opening existed as aforesaid, by reason of

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the boards forming said sidewalk, rotting and decaying, his left foot slipped into and through said hole, opening and aperture, whereby he was thrown down and upon said sidewalk and the bones of his ankle of his left foot were broken and fractured, the muscles around his ankle were torn and lacerated and his foot wounded and bruised, by reason whereof the said G. A. R. was confined to his bed, was compelled to submit to treatment of the same by surgeons and was caused to suffer great bodily pain by reason of said injuries, for two months following, was made lame and his ankle rendered weak and the same is now and will be for some time in the future, weak, and he will be unable to use it as he formerly did.

On, 19.., a notice in writing was served on the defendant by the father of said G. A. R., by leaving the same with the mayor and clerk of said city, stating the time when and the place where said injuries were received, and the nature and extent of them, a copy of which is hitherto attached, marked "exhibit B" and made a part of this petition. The said injuries were due wholly to the neglect and carelessness of the defendant and were in no way the result of want of care by the said G. A. R.

That by reason of the facts aforesaid the said G. A. R. has been injured and damaged in the sum of \$. for which amount and costs of suit the said A. S. R. as the next friend of said G. A. R., demands judgment against defendant.⁴

553. ACTION AGAINST A CITY FOR DAMAGES FOR AN INJURY FROM A FALL ON AN ALLEGED DEFECTIVE WALK.

Comes now the plaintiff and alleges that M. A. E. died at O., Nebraska, on the day of, 19.., and I. A. W. was duly appointed and qualified as the administrator of said estate by D. M. V., county judge of D. county, Nebraska.

That defendant is a city of metropolitan class duly organized and existing under the laws of the State of Nebraska.

⁴ From form in record in *Ruth v. Omaha*, 82 Neb. 846.

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That defendant caused to be laid down and constructed several years ago a wooden sidewalk on the south side of H. street between and streets; that the defendant knowingly suffered and permitted said sidewalk to become decayed, broken loose and dangerous to pedestrians.

That defendant had knowledge of said condition of said sidewalk for more than ten days previous to the injury hereinafter complained of.

That on Sunday, ..., 19.., M. A. E. in walking over said sidewalk with her son, tripped over a board which was instantly before the tripping unavoidably tilted up by her son's stepping on a loose board of such sidewalk which was broken between the stringers.

That said tilting, tripping and consequent injuries were unavoidable and the direct result of such defective condition of the sidewalk which condition was known to defendant. And the said particular board would have been discovered to have been so broken and would have been replaced and repaired, if the said generally defective sidewalk had been repaired by the city.

That by reason of such tripping M. A. E., who was a large and heavy woman, 49 years of age, fell to the ground, striking her head, scratching and breaking her nose, causing internal hemorrhages, displacement of the womb, spraining her ankle and bruising and tearing her body and flesh in such a manner as to be the direct and immediate cause of erysipelas; that by reason of the said injuries consequent from said negligence of defendant, the said M. A. E. died on the day of, 19...

That on the day of, 19.., the following notice was duly served upon the city of O., to-wit:

"To the city clerk of O., W. H. E., city clerk; C. W., city attorney.

You are hereby notified that on Sunday, ..., 19.., on account of defective and broken and loose sidewalks and defective, loose and broken boards in sidewalk on the south side of H. street, between and

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street, a few feet east of a point where the sidewalk was torn up to move a house, the undersigned in company with her son was walking east and by reason of her son's slipping upon a broken board, caused the same to be tilted up, tripping the undersigned and throwing her upon the sidewalk with great violence, breaking and disfiguring her nose, rupturing blood vessels, bruising and straining her body and causing great pain and nervousness the exact extent of which cannot now be determined.

"Signed, MRS. M. A. E."

That said M. A. E. left as her only heir and survivor, only one child, a son, C. N. E., a minor, nineteen years of age. That said C. N. E. was left an orphan, his father having previously died, and had no property or means whatever, but was dependent upon his mother for support and the completion of his education; that the said M. A. E. was devoting her whole time, care, attention and means to the support, education and development of her said only child and was keeping boarders and devoting her earnings to his said education and support, having just started him in school to become a dentist and intending to complete such education and start him in business.

That by reason of such loss the said C. N. E. has been damaged in the sum of dollars.

Wherefore plaintiff prays judgment against defendant in the sum of dollars.⁵

554. ACTION FOR DAMAGES FOR PERSONAL INJURIES RESULTING IN THE DEATH OF THE INFANT SON OF PLAINTIFF, BY REASON OF A DEFECTIVE SIDEWALK.

The plaintiff complaining of the defendant, the city of L., says:

1. That the defendant, the city of L., is a corporation organized and acting under the laws of the State of Nebraska, and is a city of the first class.

2. That the plaintiff, I. N. G., was on the day of

⁵ From form in record in Wood v. City of Omaha, 87 Neb. 213.

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....., 19.., by the county court of L. county, Nebraska, appointed administrator of the estate of A. E. G., deceased, who died in the county of L. and State of Nebraska, intestate, on or about the day of, 19...

3. That heretofore, to-wit; on the day of, 19.., the decedent, A. E. G., being then of the age of years, and unmarried, was passing along and upon the sidewalk on the south side of street, in the said city of L., Nebraska, between and streets of the said city, and in front of (here describe) and in front of a store known as street, at which point, the said sidewalk was, at said time, badly and dangerously out of repair, the same being constructed of a wooden substance, being a board sidewalk, constructed originally by the laying of wooden stringers lengthwise along said sidewalk and the nailing of boards crosswise of said stringers along said sidewalk space; that said sidewalk was, at said time and place, to-wit, ..., 19.., and in front of (here describe) and in front of said store building known as street, in said city, badly out of repair, the boards of the same, and on the same, and constituting a part of the same, at said time and place, being loose and laying loose upon said stringers, and one or two boards were entirely removed therefrom, so that said sidewalk was, at said time and place, in an unsafe and dangerous condition, and had so been in such unsafe and dangerous condition for a long time prior thereto, of all of which the said city of L. had full knowledge; that on said day, and at said place, the said decedent, A. E. G. while lawfully and rightfully passing along and over said sidewalk, without any fault or negligence of his, or without any fault or negligence of the plaintiff, I. N. G., stepped into the hole in said sidewalk, and because of said unsafe condition of the same and without any fault of his or his said father, plaintiff herein, was thrown violently and forcibly to the ground, and upon said sidewalk, so that he was seriously, dangerously and mortally injured, and from the effects of which he soon thereafter died.

That the death of said A. E. G. was caused by and through

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the negligence of the said defendant, the city of L., without any fault or negligence on his part or on the part of his father, I. N. G., who sues herein as administrator of his estate.

That said decedent, A. E. G., was a bright, healthy, intelligent, and industrious boy; that his services were worth to his father the sum of dollars per year; that the plaintiff herein has been put to a large expense in the burial and funeral services of said decedent, to-wit; the sum of dollars.

That by reason of the wrongful death of the said A. E. G., as above stated, the plaintiff has been damaged because of the loss of his services, society and expense of burial, etc., in the sum of dollars.

Plaintiff states that on the day of, 19.., and more than five days before said injuries were sustained, the defendant was given actual notice in writing of the said condition of said sidewalk.

(Here describe place and set out the manner of giving notice as in Form No. 559.)

That after the death of the said A. E. G. to-wit: on the day of, 19.., and within days from the date of his death and from the date of said injury causing his death, this plaintiff filed with the mayor and city council of said city of L., Nebraska, defendant herein, a claim for said damages in the sum and amount herein sued for, and the said city, defendant herein, failed and refused to allow or pay the same or any part thereof.

Wherefore, etc.⁶

555. ACTION FOR DAMAGES BY WIFE FOR INJURIES CAUSED BY FALL UPON AN ALLEGED DEFECTIVE SIDEWALK, ALSO ASSIGNED CAUSE OF ACTION FOR LOSS OF SERVICES AND MEDICAL ATTENDANCE.

Now comes the above named plaintiff and for cause of action against the above named defendant alleges and says:

That the defendant as such municipal corporation is under

⁶ Adapted from form in *Goddard v. Lincoln*, 69 Neb. 594.

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the law charged with the construction, supervision, control, management and keeping in repair of all of the sidewalks and other thoroughfares within the corporate limits of defendant; that it is defendant's duty at all times to keep said sidewalks and other thoroughfares in a reasonably safe condition for the use and safety of the traveling public. That plaintiff now is and was on the day of, 19.., the date of the injuries to plaintiff hereinafter stated, and for a long time prior thereto, the wife of one G. F.

That for some two months prior to said date of said injury to plaintiff, the defendant laid a narrow wooden walk across street, within the corporate limits of defendant; that said cross-walk was laid near the north platted line of P. street, at that point; that said street has never been paved; that at the time said walk was laid by defendant across said street at said point, there was then and now is near the east end of said walk a man-hole located on the north side of said walk, and in close proximity thereto; that the iron top of said man-hole at the time said walk was so laid and up to the time of said injuries to plaintiff, was some distance below the top of said walk.

That said walk was carelessly and negligently laid and constructed by defendant in such a manner that all the surface water on the east side of said street for some considerable distance south of said walk, flowed north over and upon said walk, and when leaving the north side of said walk would strike the said dirt surface of said street around and in the vicinity of said man-hole; that by reason of said careless and negligent laying of said walk by defendant, thereby permitting and forcing said water to flow over same as aforesaid, the earth was thereby and by reason thereof, gradually washed away from, and under the north side of said walk and from and around said man-hole, and thereby and by reason thereof a large, deep and dangerous excavation in said street next to and under said walk at said point was created.

That by reason of said earth being washed away from and under said walk at said point as aforesaid, the north side of

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said walk was caused thereby to sink, and to slope toward said excavation around said man-hole, thereby and by reason thereof making said point on said walk very dangerous for pedestrians to walk thereon.

That the defendant negligently and carelessly allowed and permitted said walk and said dangerous excavation to be and remain in said dangerous condition up to and for a long time prior to said date of said injuries to plaintiff. That on said date of said injuries to plaintiff, and while said walk and street were in said dangerous condition, she was walking west on and over said walk, and when she had reached said dangerous point on said walk, and by reason of said dangerous condition thereof, without fault on her part, she slipped and fell off of and over the north side of said walk at said point, and by reason of said fall, without fault on her part, plaintiff's body was with great force thereby precipitated to and into said excavation, and by reason thereof plaintiff's body struck with great force the iron top of said man-hole; that by reason of said fall, caused by defendant's said carelessness and negligence aforesaid, both bones in plaintiff's left leg were broken just below the knee; plaintiff's back was wrenched and injured, her body in divers places bruised and lacerated, and by reason of all said injuries plaintiff's nervous system was and is terribly shocked.

That said walk was at said date of plaintiff's said injuries, and from the time same was laid by defendant as aforesaid, one of the publicly traveled thoroughfares within the corporate limits of defendant; that said dangerous condition of said walk at said point had existed for such length of time prior to said injuries to plaintiff that the municipal authorities representing defendant knew of such dangerous condition of same, or they by the exercise of ordinary care and watchfulness could have known of such dangerous condition in ample time to have repaired said walk and street at said point prior to said injuries to plaintiff, as was their duty to do.

That defendant carelessly failed and neglected to repair said walk and street at said point; that by reason of said

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careless and negligent construction of said walk and said negligence on the part of defendant to repair said walk and said street at said point, plaintiff received said injuries as aforesaid; that by reason of said injuries plaintiff was thereby and by reason thereof made sick and from the said date of said injuries and up to the present time plaintiff has, by reason of said injuries suffered great bodily pain and mental anguish; that said injuries to plaintiff are of a permanent nature and such injuries are likely to cause plaintiff much pain and suffering in the future, and disable plaintiff from performing her necessary work and labor for her said husband, which labor and the performance of such household duties are reasonably worth the sum of \$. per week.

That plaintiff's said husband has laid out and expended for medical and surgical care and attention for plaintiff in the necessary treatment of her said injuries, the sum of \$.

That by reason of said injuries to plaintiff, plaintiff's said husband has sustained special damages thereby in the loss of plaintiff's services as aforesaid, and the payment of said doctor's bill, the sum of \$.

That for a good and valuable consideration heretofore paid by plaintiff to her said husband therefor, said husband did heretofore in writing assign and transfer to plaintiff all of his right, title and interest in and to said \$., special damages, which accrued to said husband by reason of said injuries to plaintiff; that by reason of said assignment plaintiff is now the lawful owner of said \$. special damages, and the same is her separate property and estate; that a copy of said assignment is hereto attached, marked "exhibit A," and made a part hereof. That within the time required by law, plaintiff caused to be served upon the said clerk of defendant, a notice in writing of the time and place where said injuries to plaintiff were received and the extent thereof; that a copy of said notice is hereto attached, marked "exhibit B," and made a part hereof.

That by reason of said injuries caused by said negligence and carelessness of defendant as aforesaid, plaintiff has sus-

tained personal and individual damages in the sum of \$.

That by reason of all the above and foregoing facts plaintiff is entitled to recover judgment against the defendant in the total sum of \$.

Wherefore plaintiff prays judgment against the defendant for \$. and costs of suit.⁷

556. ACTION BY HUSBAND FOR CONSEQUENTIAL DAMAGES SUFFERED IN CONSEQUENCE TO INJURIES TO THE WIFE CAUSED BY A DEFECTIVE STREET OR SIDEWALK.

The plaintiff for cause of action against the defendant, states:

1. The defendant is a city of the metropolitan class located in D. county, in the State of Nebraska.

2. F. street is a public street in said city duly laid out and in use by the public.

3. A portion of said street is set aside for sidewalk purposes for the use of persons traveling on foot.

4. Wooden sidewalks prior to the dates hereinafter mentioned, had been laid along said street along the west side thereof for some distance north of S. street, another public street in said city, with the exception of a strip along said street commencing about feet north of S. street and extending therefrom north about feet, which space was not covered with sidewalks.

5. In the month of, 19.., the defendant caused that portion of the west side of street set aside for sidewalk purposes, and commencing about feet north of S. street and extending about feet north thereof, to be excavated to a depth of inches below the surface of the sidewalk adjoining said space on the south and on the north, which excavation was made for the purpose of constructing a sidewalk thereon. The said excavation was left in that condition until after the injuries to L. W., the plaintiff's wife, as hereinafter set out. No barriers were put up to warn travelers passing over said ground in the daytime, and no lights to warn said travelers of the condi-

⁷ From form in record in *Forbes v. City of Omaha*, 79 Neb. 6.

tion of the street in the nighttime, nor were any barriers or lights displayed there from the time said excavation was made until after the injuries to L. W., plaintiff's wife, hereinafter mentioned, were received by her, but defendant allowed said portion of said street to be and remain in that condition until after plaintiff's wife was injured as hereinafter set forth. The character of said excavation, its depth and space in the street rendered the same dangerous to those passing along the street at that place.

6. On or about, 19.., about 8 o'clock in the evening, plaintiff's wife, L. W., was passing along said street on the west side thereof immediately south of where the excavation hereinbefore mentioned had been made. There were no barriers placed thereon and no lights were displayed there for the purpose of warning plaintiff's wife and passers-by that said excavation had been made and that it was dangerous to pass along said street at that place. Plaintiff's wife, L. W., passed along said wooden sidewalk south of said excavation and going to the end of the sidewalk and not knowing that said excavation had been made, and no barriers or lights being displayed to warn her of the condition of said place, she stepped off the sidewalk into the excavation, whereby she was thrown down upon and against said sidewalk adjacent to said sidewalk and her head fell and struck upon said sidewalk and her body upon the sharp edges thereof and upon the frozen ground, rendering her unconscious and bruising and injuring her head and body internally. (Set out injuries.)

7. Plaintiff further states that by reason of the said injuries to his wife it became necessary for the plaintiff in this action, as the husband of said L. W., to employ physicians to attend her injuries and to treat her during the illness caused to the plaintiff's wife by said injuries, and plaintiff did employ physicians and nurses for that purpose and laid out and expended therein the sum of \$. and it also became necessary for the plaintiff to procure at a large expense, to-wit, the sum of \$., medicines in treating plaintiff's wife during said illness, sickness and injuries

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caused by reason of the facts hereinbefore set out, and which said sum of \$. the plaintiff did lay out and expend for the purposes aforesaid; that during all the time since the injuries the plaintiff has been deprived of the society and services of his wife to his further damage in the sum of \$., in all to the plaintiff's damage in the sum of \$.

8. That plaintiff's wife had at the time of said treatment and expense aforesaid, no separate property and the said expenses were not incurred by her in any manner but were incurred, laid out and expended by the plaintiff as the husband of said L. W.

9. That on or about the of, 19.., the plaintiff served a notice on the defendant city by delivering to and leaving with the clerk and mayor of said city a notice in writing, a copy of which is hereto attached and made a part of this petition.

Wherefore, plaintiff demands judgment against defendant for the sum of \$. and costs of suit.^s

557. ALLEGATIONS IN ACTION FOR DAMAGES FOR INJURIES CAUSED BY FALLING UPON A SLIPPERY SIDEWALK WHERE SNOW AND ICE WERE ALLOWED TO ACCUMULATE.

Plaintiff states on said day of, 19.., there was in said city a street named S. street, along the following described property (here describe) and along the north side of said street was a sidewalk, which said street and sidewalk was and still is a public way, under the jurisdiction and control of said city, and open to the public for passage. Long prior to, 19.., and from about the day of, 19.., the defendant negligently and carelessly allowed ice and snow to accumulate on the said sidewalk, and there to remain, whereby said walk became and was slippery, dangerous and unsafe for passage, as defendant well knew.

(Here allege notice of defect as in Form No. 559.)

On said day of, 19.., the plaintiff, in the nighttime, having no knowledge or notice of such danger-

^s From form in record in Wright v. City of Omaha, 78 Neb. 124.

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ous condition of said sidewalk, attempted to pass along such walk, and stepped upon such slippery accumulations of snow and ice, and thereby, without any fault or negligence on his part, was caused to fall violently down upon such snow and ice, and thereby received grievous injury of his hip (describe injuries), to the damage of the plaintiff in the sum of dollars.

And thereafter, and within days after he recovered his mental faculties, so as to be able to give attention to the cause and nature of his injury, and on the day of, 19.., the plaintiff made a sworn statement, giving his name in full, the time, place and circumstances of the injury complained of, and the names of the witnesses thereto, as fully as to him known, which statement, sworn to by the plaintiff, and by him subscribed, he, on the day of, 19.., filed with the city clerk of the defendant, in his office.⁹

558. ACTION FOR DAMAGES FOR INJURIES CAUSED BY A DEFECTIVE SIDEWALK.

Plaintiff states:

1. That said city is a municipal corporation and city of the first class having less than inhabitants, and organized under and by virtue of the laws of the State of Nebraska.
2. That as such municipal corporation said city had the care, management, and control of the streets and sidewalks within said city, and had power and authority and the necessary means, and that it was its duty, among other things, to keep said streets and sidewalks in good condition and repair, so that persons could at all times reasonable and proper, walk over and along the same without danger of receiving physical injury therefrom.
3. That S. street, otherwise known as G. avenue, is one of the principal streets in said city, and that the west side of said S. street, between Q. and R. streets, is near the business portion of said city, and at a place where there was

• Form in Foxworthy v. Hastings, 23 Neb. 772.

much travel at and a long time prior to the time when the injury complained of by the plaintiff was received.

4. That for a long time prior to the receiving of the injury complained of by plaintiff, the sidewalk on the west side of said street, between said Q. street and said R. street, and more particularly in front of (here describe) was defective and in a dangerous and unsafe condition for travel thereon, by reason of the uneven surface of said sidewalk caused by the removal of several planks from the same; that the said sidewalk was constructed of planks laid across wooden supports extending lengthwise of said sidewalk, to which supports the said planks were fastened by nails; that the nails of several of the planks in said sidewalk had been allowed to become and remain loosened; that the planks were thereby loosened and some of them had been removed entirely from said sidewalk, thereby causing deep and dangerous holes in said sidewalk, which were concealed and rendered extra hazardous and dangerous to travelers thereon; that the defendant city had actual and constructive notice of said defect, and in not repairing the same, or so providing as to prevent or warn persons from passing over the same, was guilty of gross negligence and want of care.

5. That on the said day of, 19.., plaintiff was lawfully traveling on foot on said S. street and on the sidewalk thereon in the locality above described, and while so traveling on said sidewalk, and while in the exercise of ordinary care, and without any fault on his part and without any warning, he not then seeing or knowing of the defect in said sidewalk, or of any defect whatever in the same, plaintiff stepped on the edge of the plank next to the place from which said planks had been removed and by reason of the absence of said planks from their proper place, he fell and was thrown with great force and violence backwards onto said sidewalk, the small of his back striking across the edge of a plank of said sidewalk, whereby plaintiff was greatly and permanently injured in and about the small of his back, and was otherwise bruised, strained, and internally injured thereby; that by means of said injuries he has been totally

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disabled for doing manual labor of any kind whatever, and rendered an invalid for life, to his damage in the sum of dollars.

6. Allege notice of defective condition of said walk as in Form No. 559.

7. Allege notice of the injury as in Form No. 560.

8. That long prior to the filing of his petition, and within days of the date of the injury complained of, plaintiff presented his said claim in writing, giving a statement of plaintiff's full name, the time, place, nature and circumstances of the said injury, all in due form as required by law, and filed the same with the clerk of said city; and the same was read at a meeting of the city council held a long time prior to the commencement of this action, and that defendant has wholly failed and neglected to allow said claim or any part thereof.¹⁰

559. ALLEGATIONS OF NOTICE OF DEFECT REQUIRED TO BE FILED WITH THE CITY FIVE DAYS BEFORE OCCURRENCE OF INJURY (NEBRASKA).

Plaintiff states that on the day of, 19.., the defendant was given actual notice in writing of the said condition of said sidewalk (here describe the place, where the defect in the sidewalk existed, which must be the same as contained in the notice filed with the city and must correspond with the place where the injury occurred) by leaving said notice with the city clerk, one a copy of which notice is hereto attached, marked exhibit and made a part hereof; that the defendant failed and neglected to repair said sidewalk or cause the same to be done after the giving of said notice before the happening of the injury herein complained of but negligently and carelessly allowed the same to remain in said dangerous condition.¹¹

¹⁰ Form in *Lincoln v. Smith*, 28 Neb. 762.

¹¹ Adapted from form in record in *Ruth v. Omaha*, 82 Neb. 846.

Nebraska. Actual notice in writing of the defect of a public way or sidewalk must have been filed with the city clerk at least five days before the occurrence of the injury or damage in order to render the city liable for damages or injuries suffered or sustained by reason of

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560. ALLEGATIONS OF NOTICE IN WRITING OF TIME AND PLACE WHERE INJURY WAS RECEIVED AND NATURE OF INJURY (NEBRASKA).

Plaintiff states that on the day of, 19..., and within days after the occurrence of the injury hereinbefore complained of, a notice in writing was served on the defendant by plaintiff (or if served by someone for him state by whom it was served) by leaving the same with the mayor (or city clerk), of said city, stating the time when, and the place where said injuries were received, and the nature and extent of the injuries, a copy of said notice is hereto attached, and marked exhibit and made a part of this petition.¹²

defective public ways or sidewalks. Cob. Ann. Stat. Neb. 1911, sec. 9057.

A petition failing to allege filing of such notice with the clerk as required by statute is fatally defective. *Goddard v. Lincoln*, 69 Neb. 594; *LaHarpe v. Greer*, 74 Kan. 74.

Written notice of the defective condition of public ways or sidewalks which is required to be filed with the clerk five days before the occurrence of an injury has no application to defects caused by the city itself in negligently constructing a sewer in one of its streets. *Updike v. City of Omaha*, 87 Neb. 228.

Notice to the city of defective condition of sidewalk where the injury occurred, in cases decided prior to the passage of the act requiring notice to be filed with city discussed. *Nothdurft v. Lincoln*, 66 Neb. 430, 434; *Lincoln v. Calvert*, 39 Neb. 305; *City of Plattsmouth v. Mitchell*, 20 Neb. 228; *Lincoln v. Pirner*, 59 Neb. 634.

¹² Adapted from form in record in *Ruth v. Omaha*, 82 Neb. 846.

Nebraska. Notice to city of accident or injury complained of with the statement of the nature and extent of the injuries and the time when and the place where the same occurred, in writing, must be given to the mayor or city clerk within 30 days after the occurrence of such accident or injury. Cob. Ann. Stat. 1911, sec. 8538.

Notice of the injury as required by the statute must be given within the prescribed time and the petition must allege the giving of such notice, otherwise the court is without jurisdiction, and the incapacity of the person injured to give the notice will not excuse noncompliance. *Schmidt v. Fremont*, 70 Neb. 577; *Nothdurft v. Lincoln*, 75 Neb. 76.

A dangerous accumulation of snow and ice on a sidewalk is a defect therein within the meaning of the statute exempting a city from liability for damages arising from a defective sidewalk, unless notice of the accident was filed with the city clerk within time required. *McCollum v. South Omaha*, 84 Neb. 413.

The notice given of the accident should describe the place of the

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561. ALLEGATIONS OF NEGLIGENCE IN ACTION AGAINST A CITY FOR DAMAGES CAUSED BY FALLING FROM A SIDEWALK INTO CREEK, NO GUARD OR PROTECTION BEING PROVIDED.

Plaintiff states that upon the said day of, 19.., and for a long time prior thereto, said T street, or the east side thereof, between L and K streets, in front of (here describe) was out of repair and in a dangerous condition, in this, to-wit: Said T street intersects T creek at this point, and the traveled sidewalk in front of said lot along the east side of said street, at that time, was not extended across the creek, but only built up to the bank or edge of said creek, and that from the end of said walk on the bank of said creek there is an abrupt fall of from to feet to the bed of said creek, the bank at that point being nearly perpendicular, and there being no railing or guards at the end of said walk, and no light or signal to indicate such dangerous condition; that at about o'clock in the evening of the day of, 19.., it being quite dark, the plaintiff, lawfully traveling on said street and upon said sidewalk, and unaware of the dangerous condition, and without his negligence, was precipitated into said creek, from the end of said sidewalk, and received great bodily injury, by which he has been kept in bed and detained from business about two weeks, since which time he has suffered great bodily pain, he receiving serious injury in and about the neck, and otherwise, and has spent for medical attendance and nursing, and has been permanently crippled, to his damage in the sum of dollars.¹²

accident with such technical accuracy that the court as a matter of law, when the notice is offered in evidence, could say that it was legally sufficient. *Carson v. City of Hastings*, 81 Neb. 681.

Kansas. Written notice giving the time and place of the happening of the accident or injury received and circumstances relating thereto must be filed with the city clerk within four months after the accident and prior to the bringing of the suit, otherwise action cannot be maintained. Gen. Stat. Kan. 1909, sec. 870.

¹² Form in *Kinney v. City of Tekamah*, 30 Neb. 605.

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562. ALLEGATIONS IN ACTION FOR DAMAGES FOR INJURIES CAUSED BY FALLING ON A DEFECTIVE SIDEWALK.

Plaintiff states that said walk on the south side of L street in front of the following described property (here describe) was, on or about the day of, 19.., in a very imperfect, unsafe, and dangerous condition, and had been so for some time prior to said date; that the timber on which said sidewalk was built and to which the boards were nailed had rotted away, and the boards had become loose, so that it was unsafe for people to travel over said walk; the plaintiff, while going to her work on the morning of the of, 19.., using ordinary care and without any fault or negligence on her part, accidentally fell on said sidewalk by reason of the unsafe condition thereof, and by reason of the same being in an imperfect state of repair.¹⁴

563. ALLEGATIONS IN ACTION AGAINST CITY FOR DAMAGES CAUSED BY THE ALLEGED NEGLIGENCE IN ALLOWING TIMBERS TO BE STREWN UPON THE STREET, CAUSING PLAINTIFF TO BE THROWN FROM HER BUGGY AND SERIOUSLY INJURED.

Plaintiff states that on the day of, 19.., and for a long time prior thereto, with full knowledge of all the facts that said defendant corporation negligently permitted dangerous and unguarded excavations to be made and remain, and timbers to be strewn upon the streets of said city within the corporate limits thereof, upon St. J. avenue and S street, at or near the junction thereof, into which excavation and upon said timbers, without any fault or negligence upon her part, the wheels of the buggy in which the plaintiff was riding (as she had a lawful right to do upon said streets), fell, causing her to be violently thrown therefrom into said dangerous and unguarded excavations and upon said timbers, thereby dislocating one wrist, breaking one arm, breaking one toe, inflicting a serious contusion on her head, wrenching and straining her back, and otherwise bruising and injuring said plaintiff in her body and mind, to her damage in the sum of dollars; that by reason and in consequence of

¹⁴ Form in *Lincoln v. Woodward*, 19 Neb. 259.

the said fall and injuries aforesaid, plaintiff was compelled to procure and did procure medical and surgical attendance, and in caring and nursing for said injuries, for which she was compelled to pay out and for said services the sum of dollars.¹⁵

564. ALLEGATIONS OF NEGLIGENCE IN AN ACTION FOR DAMAGES CAUSED BY PLAINTIFF DRIVING INTO A DITCH IN A CITY STREET.

Plaintiff further alleges that said defendant city has failed and neglected to keep that part of its streets known as H street between and street, and more particularly immediately adjacent to and west of the west line of street open and in repair, and in a safe and passable condition, and this plaintiff further alleges that said defendant city, willfully and negligently permitted a gutter or depression about a foot deep to exist and remain in said H street immediately adjacent to and west of the west line of street; that said gutter or depression existed in and across H street, at right angles therewith, and formed a hole or depression about one foot deep, and sloping from the bottom thereof to the surface of the street and thus formed a ditch or depression crossing H street at right angles therewith.

Plaintiff further alleges that said gutter or depression was caused by the negligent acts of the city in permitting water to run across the said street at right angles therewith, and washing away a portion of the bed or body of earth forming the street at this place; that said gutter had existed at said place aforesaid for a long time prior to the day of, 19.., and that the said defendant city had due notice thereof.

Plaintiff further alleges that said defect has existed in said street for so long a time prior to the day of, 19.., that the said defendant city had actual and constructive notice of the existence thereof, and that the injuries received by this plaintiff as hereinbefore set forth were due to the negligence of said defendant city in not keeping said street

¹⁵ Form in Weigel v. Hastings, 29 Neb. 379.

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open and in repair, and in a safe and passable condition and not through any fault or neglect of this plaintiff.¹⁶

565. ALLEGATIONS OF NEGLIGENCE IN AN ACTION FOR DAMAGES CAUSED BY A DEFECTIVE SIDEWALK.

That on or about the day of, 19..., there was a certain sidewalk located on the west side of avenue, between street and street, in said city; that said avenue is a common thoroughfare in said town, and between the street and street on the said day of, 19..., and for some time prior thereto, said walk was out of repair, the boards being loose and the stringers to which the boards were nailed had rotted away so that it was unsafe for people to travel over said walk. The plaintiff, while going from her home, which is located on the south side of street and on the east side of avenue, to the business portion of the city, using ordinary care and without any fault or negligence on her part, fell on said walk by reason of the unsafe condition thereof, and by reason of the same being in an imperfect state of repair. Plaintiff further alleges that said city, for more than one year prior thereto, had due and timely notice of the imperfect condition of said walk, yet said defendant carelessly and negligently permitted said walk to remain out of repair.

Plaintiff further says that by reason of the fall occasioned by the imperfect condition of the walk as above related she was thrown upon the ground, remained unconscious for some time, and sustained injuries, and she has been detained from her work for about four months; and by reason of the injuries aforesaid she has lost the use of her left hand, to the damage of this plaintiff in the sum of dollars.¹⁷

566. ALLEGATION OF NEGLIGENCE IN AN ACTION AGAINST A CITY FOR DAMAGES FOR PERSONAL INJURIES RECEIVED ON SIDEWALK.

The sidewalk was constructed of pine planks about feet wide, and said sidewalk connected with a piece of side-

¹⁶ Form in *South Omaha v. Hager*, 66 Neb. 805.

¹⁷ Form in *City of Harvard v. Stiles*, 54 Neb. 26.

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walk only four feet wide, leaving feet at the end of said foot walk at an abrupt termination not being connected with the other walk. That at the point where the said foot walk terminated, there was a distance of inches from the surface of the said sidewalk to the surface of the ground at the end of said walk, with no railing guards, lights, notice or anything else to enable travelers to see said defects or to protect themselves from being injured thereby; that there was a street lamp on the corner across the street from the point herein described, at said date, but the same was not lighted, and there was no protection, railing, notice or danger signal to shield or to protect people traveling along said street, or sidewalk, from accident or injury, or to warn them thereof. And that said L. street was, at the times herein mentioned, and now is one of the public thoroughfares of the defendant village, and was and is used by the public as such, and was so used at the time of the occurrence of the injuries hereinafter complained of by the plaintiff.¹⁸

¹⁸ Form in *Village of Plainview v. Mendelson*, 65 Neb. 85.

Form of petition in an action under the statute by a town to annex to its corporate limits contiguous territory. This petition was held to be defective in that it did not appear from the facts stated in the petition that the property sought to be annexed would be benefited by the annexation. *Village of Hartington v. Luge*, 33 Neb. 623.

Allegations in action for damages caused by water flowing into plaintiff's cellar, caused by the erection of an embankment in grading the street. *City of Kearney v. Thoenason*, 25 Neb. 147.

Allegations in action for damages sustained by a lot owner by reason of filling in the street in front of his lot and raising the street above the level of the lot when the buildings were erected. *Hammond v. Harvard*, 31 Neb. 635.

Allegations in action for damages for injuries received while passing along an alleged defective sidewalk. *City of Lincoln v. Holmes*, 20 Neb. 39.

Allegations in action against a city for damages for injuries resulting from a defect in a street caused by negligently filling a sewer excavation. *Udike v. City of Omaha*, 87 Neb. 228.

A petition sufficiently charges negligence against a city when it alleges facts from which a person may reasonably infer that the street was not kept in a condition reasonably safe for public travel. It is not necessary to state a cause of action that such inference should be a necessary one from the facts alleged in the petition. It is sufficient if it be a reasonable inference. *Aurora v. Cox*, 43 Neb. 727.

567. ACTION FOR DAMAGES FOR PERSONAL INJURIES RECEIVED BY REASON OF THE ALLEGED DEFECTIVE CONDITION OF A SIDEWALK.

Plaintiff says that the defendant is, and at all times hereinafter mentioned was, a municipal corporation in F. county, Kansas, a city of the second class, duly organized and existing under and by virtue of the laws of the said state.

That there is and for many years last past has been, two public streets in said city, one of which extended east and west, and was commonly called "S. street," and the other extended north and south, and was commonly called "M. street," and that said streets cross each other.

That at the place of the intersection of said streets, along the north side of S., and across M., there was at all said times a plank cross walk, which was much traveled and used by the general public.

That on and long prior to, 19.., at the eastern end of said cross walk, the planks of which it was constructed were curved upward, so that they and the dirt which was beneath them, formed an abrupt elevation and obstacle directly in the way of the eastern approach to said cross walk, the top of which was about ten inches above the level of said approach; and that said curvature of the planks also formed a steep incline on said cross walk from the eastern end of it downward to a place about four feet westward.

That said elevation and incline made said cross walk highly dangerous to persons passing along and over the same, and that by the exercise of reasonable diligence defendant might have known, and that it did know, the facts above alleged.

That on the date last aforesaid, while plaintiff was walking westward on and over the eastern end of said cross walk, exercising due care, and without any fault or negligence on his part, he was by said elevation and on account of the said dangerous and defective condition of said cross walk, as above

A petition to recover from an abutting owner damages for personal injuries resulting from his failure to repair an adjacent sidewalk which did not allege that the city in notifying defendant to make repairs indicated the manner of making them or the kind of materials to be used, is insufficient. McAuliffe v. Noyce, 86 Neb. 665.

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described, made to stumble over said elevated end, and slip and fall, whereby he sustained great physical injuries. That said injuries consisted of a rupture in plaintiff's right side, in the region of the groin, and sprains in and bruises upon his left arm, and sundry other bruises, sprains and bodily injuries, which plaintiff is unable more definitely to describe. That on account of the injuries which plaintiff so as aforesaid sustained, he suffered great bodily pain constantly for many weeks thereafter, and that such pain and suffering has since recurred from time to time; that said injuries are incurable, and his sufferings on account thereof will continue from time to time during all the rest of his life. That plaintiff is without means, and that at the time plaintiff sustained said injuries he was, and has ever since been, and will continue to be, solely dependent upon his daily physical labor for support, and that said injuries have permanently lessened his earning capacity; that he has been put to expense for medical and surgical assistance and surgical appliances in endeavoring to be cured of his said injuries, to the extent of \$.....

That on account of the facts above stated, plaintiff has been damaged in the sum of \$.....

That on the day of, 19.., plaintiff presented, duly verified, a claim in writing for said damages to the defendant, but that defendant has not paid the same nor any part thereof.

Wherefore plaintiff prays judgment against defendant for the sum of \$....., and costs of this action.¹⁹

563. ACTION FOR DAMAGES FOR PERSONAL INJURIES RESULTING FROM A FALL ON A DEFECTIVE SIDEWALK.

Plaintiff for his cause of action against the defendant, says:

That the defendant is now and was at the time of the transactions hereinafter mentioned, a city of the second class, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Kansas.

That there was at the time plaintiff received the injury

¹⁹ From form in record in *City of Ottawa v. Green*, 72 Kan. 214.

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hereinafter stated and is now in said city, a certain public highway and street known as and designated S. avenue; that at the time plaintiff received the injury herein complained of and for a long time prior thereto said avenue was and had been a public highway and street, and as such was used by the public for travel, for the free passage of persons on foot and with teams, wagons and other vehicles.

That plaintiff further says that along the south side of said avenue, street and highway, and along the north side of lot, in block, in said city, there was at the time of the injury hereinafter complained of and a long time prior thereto, a certain sidewalk used by said city for the free use and passage of all persons on foot and at all times.

Plaintiff further says, that said sidewalk was constructed of pine boards, supported by pine stringers commonly called "two-by-fours" placed upon the ground, the stringers ran from east to west; that across these stringers from north to south, pine boards, three-quarters of an inch thick and six inches wide and about four feet in length were originally nailed to said stringers; said sidewalk is about four feet in width. That said sidewalk at the time plaintiff received the injuries complained of, was and for a long time prior thereto had been in an unsafe and dangerous condition.

Plaintiff further states that the unsafe and dangerous condition of said sidewalk was well known to the defendant at the time of the injury and for a long time prior thereto, that the street commissioners and other officers and agents of the said city, defendant, had prior to the time plaintiff received the injury hereinafter stated been notified of the dangerous condition of said sidewalk; that the dangerous and unsafe condition of said sidewalk at the place where plaintiff received the injury hereinafter complained of, was well known to the defendant at the time plaintiff received the injury hereinafter stated and for a long time prior thereto.

That said sidewalk at the time plaintiff received the injuries mentioned was old, dilapidated and decayed, and at said time the stringers were so old, decayed and rotten that they would not support the boards laid upon the stringers and would not

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hold the nails driven through said boards and into said stringers and many of said boards were loose and not securely fastened to said stringers, and four or five of the boards were removed from said stringers and destroyed; there were other boards in said walk at said point where plaintiff was injured with one end of said boards not resting on the stringers and having no support whatever.

That said sidewalk had been permitted by the officers and agents of said city to be and remain in said unsafe and dangerous condition for several weeks before plaintiff received the injury hereinafter complained of, yet the said defendant well knowing the unsafe and dangerous condition of said sidewalk did on the day of, 19.., and for several weeks prior thereto, knowingly, negligently and willfully permit said sidewalk to be and remain in said unsafe and dangerous condition to the great danger and damage of persons passing over and using said street and sidewalk.

Plaintiff further says: That on , 19.., while passing over, along and upon said sidewalk and street without fault or negligence on his part, plaintiff was tripped by one of the loose boards of said sidewalk at the point on said street as aforesaid, which said board was thrown or lifted up and struck plaintiff on the head and by reason of the blow received as aforesaid, became unconscious and so remained for some time; that he suffered severe pain in his head for about four weeks, and at different intervals has suffered severe pain in his head ever since.

Plaintiff further says, that without fault on his part, by reason of said defective sidewalk as aforesaid and by reason of said blow by said board upon the head as aforesaid, he was thrown with great force and violence to the ground, knocked down (describe injuries).

Plaintiff alleges that by reason of the injuries he received he is permanently disabled. Plaintiff further states that by reason of the injuries received, he was confined to his bed for two weeks, that he was confined to his room for about seven weeks and that for four months he was not able to dress himself without assistance. He has been to great expense in

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being nursed, treated and attended in endeavoring to be cured, for which plaintiff claims damages on account of loss of time in the sum of dollars; for medical attendance and treatment, ... dollars; for the services of a nurse in the sum of dollars; for medicine in the sum of dollars, and damages on account of said injuries to his person as aforesaid and for bodily pain and mental anguish in the sum of dollars, and amounting in the aggregate to the sum of dollars.

Plaintiff says that he is a house and sign painter and paper hanger by trade and occupation, and that his services are fairly worth dollars per day; that he was earning the sum of dollars per day at the time of the injuries, and had been for a long time prior thereto.

Plaintiff further says, that on the day of, 19.., he filed and presented his said claim against said city, in writing, with a full account of the items, and duly verified by the oath of plaintiff as required by law, to the mayor and councilmen of said city, to be by said mayor and councilmen audited and allowed as provided by law and said city defendant, through its said mayor and councilmen refused to allow said claim or any part thereof.

Wherefore, plaintiff asks judgment against said defendant for the sum of dollars, with interest and costs of suit.²⁰

569. ALLEGATIONS OF NEGLIGENCE IN ACTION AGAINST A CITY FOR DAMAGES ALLEGED TO HAVE RESULTED FROM BEING STRUCK BY A BILLBOARD BLOWN DOWN BY A STRONG WIND.

Plaintiff states that long prior to the last named date, defendant had caused and suffered to be constructed upon the south side of C street and next west of S street, within the corporate limits of said city, a large frame structure for the purpose of supporting thereon boards for the purpose of advertising shows, fairs, expositions, excursions and such other matters and things as are usually and commonly advertised by the posting of large paper bills. There had been long prior to that time upon the face or north front of such frame-

²⁰ From form in record in *City of Garnett v. Smith*, 72 Kan. 664.

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work a large amount of boards and lumber of the length of about feet, extending east and west upon said C street, and of the height of about feet, making about square feet of one-inch lumber so supported upon said frame-work and constructed upon and adjoining the south side of the sidewalk and pavement upon said street. Said frame-work was, as constructed, dangerous, weak, defective and insufficient, and not constructed in a safe or secure manner. The uprights supporting said lumber were of insufficient strength to support the same and the pressure which might come against such lumber and frame-work, such as might be caused by the ordinary and common winds prevalent in that locality. The braces extending from said uprights were weak and insufficient to stay, support or strengthen the same to prevent said uprights and lumber thereon from being blown over and caused to fall upon the sidewalk and pavement in case of the pressure of such winds against the same. The fastenings of the ends of such braces were weak and defective, and insufficient to resist the strain of such winds upon the said lumber, uprights and braces, so as to make the said frame-work insecure and dangerous to passers-by along such street and sidewalk. Said frame-work and the lumber thereon had been in such condition for a long period of time prior thereto, to-wit, for the space of more than months, and all of which said weak and dangerous condition of said frame-work, supports and lumber was then and during all such time well known to the officers, servants and agents of said defendant. But notwithstanding the said notice and knowledge, the said defendant by its said officers, servants and agents had suffered and allowed said frame-work and lumber to be in such insecure, unsafe and dangerous condition during all said period of time without any effort on the part of said defendant, its servants or agents, or any other person or persons, to make the same safe and secure.

Plaintiff further states, that the said frame-work was constructed along and adjoining a sidewalk in said city of A., which was frequently and generally used, and frequently and commonly thronged with large numbers of passengers, foot-

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men and others who went about said city in the ordinary and usual discharge of their business, and who were thereby exposed to danger and loss of life and limb from such insecure and unsafe and dangerous structure.

Plaintiff further states, that on or about said day of, 19.., and while going along said sidewalk in the discharge of his usual and ordinary business, in a careful and cautious manner, and without any fault or negligence on his part, the said frame-work with the lumber thereon, because of such defective, dangerous and insecure construction thereof fell over and upon this plaintiff, and thereby caused him great personal injury (describe injuries).²¹

570. ALLEGATIONS IN ACTION FOR DAMAGES RESULTING FROM PRECIPITATION OF WATER AND SEWAGE UPON PLAINTIFF'S PROPERTY.

Plaintiffs state that in the construction and maintenance of the said sewers by said city, defendant was negligent, careless and unskillful, and damaged the plaintiffs in this, to-wit: That the said sewers were so constructed that when the K river into which they emptied was swollen on account of the spring rain, the water in the said river in its rise would reach a point higher than the head of the sewers or the various openings into the said sewers; and the said defendant city was further negligent and careless in this, to-wit; that they failed to provide for the said sewers suitable flood-gates, or flood-gates of any kind, with which the mouths of the sewers could be closed during the rise in the said K river; that by reason of the construction of the said sewers as aforesaid and by failing to provide flood-gates as before stated, the water of the said river flowed backwards through the said sewers along in the spring of 19.., or on or about the day of in said year, and flooded the district in which the plaintiff's property was located as hereinbefore stated, to the depth of from to feet, and that the same continued so to be flooded from said cause hereinbefore mentioned for a period of from to days; that there was higher

²¹ Form in *Langan v. Atchison*, 35 Kan. 318.

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ground between the property of the plaintiffs and the river than the ground upon which the plaintiffs' house was located, which said ground was high enough to protect, and would have protected, the property of the plaintiffs from the rise in the river had it not been for the construction of the said sewers through and upon the said high ground, thereby creating a water-way through which, and only through which, the plaintiff's property could have been flooded.²²

571. ALLEGATIONS OF NEGLIGENCE IN AN ACTION FOR DAMAGES FOR INJURY RESULTING FROM DEFECTIVE SIDEWALK.

And plaintiff further avers that in the months of and, 19.., said defendant did willfully, knowingly, and negligently let and permit said sidewalk on said street, between said street and the bridge over said creek, in said city, to get out of repair, and to be and so remain out of repair and in a dangerous condition, for a great length of time, and to the great imminent danger of travelers passing along thereon.

And plaintiff further avers that on the day of, 19.., and between the hours of and o'clock in the evening of that day, while in the pursuit of his lawful business, and as he had a proper and legal right to do, he was passing along said street and sidewalk, and on the west side of said street; and between said street and the bridge over said creek, in said city of, and without any fault, wrong, or negligence upon his part he fell and was precipitated from said sidewalk on the west side of said street, to the ground on the west side thereof, which was about feet below the level of the said sidewalk, ... for the reason that said sidewalk was not properly protected by bannisters and railing, or other devices of a similar or proper nature, for the protection of passengers passing over it, and because the same was improperly erected and constructed, and was allowed to remain in such dangerous condition, and after the attention of the proper authori-

²² Form in King v. Kansas City, 58 Kan. 334, 335; see also 65 Kan. 64.

ties of said defendant had been repeatedly called thereto by and for said plaintiff and others and after the legally-constituted authorities of said defendant had been notified that said sidewalk was unsafe and unfit for travel, and dangerous to pedestrians and others.²³

572. ALLEGATIONS IN ACTION AGAINST CITY FROM WHICH NOTICE TO CITY MAY BE INFERRED.

That prior to the day of, 19.., the railway company had constructed the track of its line of street railway over and along W. N. avenue in the city of W. in such a careless and negligent manner that the same was, on the day of, 19.., and for a long time before and after that day, a dangerous obstruction to travel along the street; and that the city of W., on the day of, 19.., and for a long time before and after that day, negligently and carelessly permitted the railway company to construct and maintain the track of its line of street railway on W. N. avenue in such a careless and negligent manner as to dangerously obstruct travel on the street.²⁴

²³ Form in *Maultby v. Leavenworth*, 28 Kan. 531.

²⁴ Form in *Union St. Ry. Co. v. Stone*, 54 Kan. 83, 96.

Allegations sufficiently definite as to the place where plaintiff received his injuries, and as to their nature and extent. *Garnett v. Smith*, 72 Kan. 664.

Allegations of filing of notice of injury received as required by statute of Kansas. *Cook v. Topeka*, 75 Kan. 535.

Allegations sufficient to constitute cause of action in *Iola v. Farmer*, 72 Kan. 620.

Husband and wife cannot jointly maintain an action to recover for damages for injuries sustained by wife, and for loss of services of wife on part of husband. *Eskridge v. Lewis*, 51 Kan. 376.

Parties. A lot owner is not a necessary party in action to recover damages for injuries resulting from the alleged defective condition of sidewalk put down by lot owner. *Topeka v. Sherwood*, 39 Kan. 690.

A petition that states with circumstantial particularity that the defendant, an incorporated city of the second class, negligently left one of its streets out of repair, by reason whereof the plaintiff, without fault on his part was injured, states facts sufficient to constitute a cause of action. *Topeka v. Tuttle*, 5 Kan. 186; *Jansen v. Atchison*, 16 Kan. 358, 381.

Liability of city for defective condition of sidewalks discussed in

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573. ACTION FOR DAMAGES ON ACCOUNT OF INJURIES RECEIVED AT THE HANDS OF A MOB (KAN. GEN. STAT. 1909, SEC. 2933).

Plaintiff states: That the defendant now is, and was during all of the times hereinafter mentioned, a city of the second class in A. county, State of Kansas, and duly incorporated as such city under the laws of the State of Kansas, and at the time of the grievances hereinafter mentioned, had a population of about people, and that W., M. and J. avenues are public streets in said city.

2. That the plaintiff on the day of, 19... at about o'clock P.M., while on the public streets of said city, at or near the corner of W. and M. avenues, walking along in an orderly manner, was attacked by a mob of some 10 or 15 persons, the names of whom are unknown to plaintiff, who threw stones, clods, and other missiles, at plaintiff

Emporia v. Schmidling, 33 Kan. 485; *Gould v. Topeka*, 32 Kan. 485; *Wellington v. Gregson*, 31 Kan. 99; *Eudora v. Miller*, 30 Kan. 494; *Langan v. Atchison*, 35 Kan. 318.

An incorporated city which negligently leaves one of its sidewalks out of repair, by reason whereof a person, without fault or negligence on his part, is injured, is liable for the damages sustained. *Fort Scott v. Brothers*, 20 Kan. 455.

Wrongful acts of officers. In an action to recover against a city for the wrongful acts of its officers a petition which states that the acts complained of were done by such officers and while they were acting as such officers does not state a cause of action against such city, it not appearing therein that the act complained of was done by the authority of the city, or in the performance of some official act authorized and directed by the city. *Fowler v. Kansas City*, 64 Kan. 566.

Sufficient allegations of notice of defects. A petition for injuries from a defective sidewalk, alleging that the walk was negligently constructed, and that defendant city well knowing this, had permitted it to remain in a defective condition until after the accident, charges the city with notice of the defect. *Lewis v. Eskridge*, 52 Kan. 282.

Allegations sufficient to charge the city with notice or knowledge of the defect in street which caused the injury. *Union St. Ry. Co. v. Stone*, 54 Kan. 83.

It must appear either that the city had notice of the defect, or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which with reasonable and proper care should have been ascertained and remedied. *Jansen v. Atchison*, 16 Kan. 358.

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and his companion, one J. F. M.; that he continued his progress along said M. avenue east until he came to the west side of J. street, when he turned south to go in the direction of his home with his companion, and when near the alley between M. avenue and B. street, he was again attacked by said mob, which had increased in size and was now composed of some 30 or 40 persons, none of whom are known to plaintiff, who had congregated at that point in the dark for the purpose of again attacking plaintiff, and there stood in wait for the advance of plaintiff and his companion, and when they reached said alley a volley of stones, clods and other missiles was hurled at them by said mob, and several shots from guns were fired at them, one bullet passing very close to plaintiff's head, and threatening, abusive, obscene and profane language, such as, "Now, kill the God damn sons of bitches," "Come on, boys, let's finish them up!" was used against plaintiff and his companion, and plaintiff was struck on the head on the right side over the ear by a flying stone, piece of retort or other missile, and his right ear was cut nearly in two, and he was made almost deaf in said ear, which deafness still continues, and he was so stunned by said blow as to be rendered almost insensible, but that plaintiff and his companion proceeded rapidly south on said public street as fast as they could, said mob following them and continuing its attacks upon them, throwing stones, clods, and other missiles at them, and using threatening, abusive, obscene and profane language toward plaintiff, until they reached No. S. J. avenue, the home of one C. C. M., where they took refuge, and while there said mob gathered around the house, and threw stones, clods and other missiles against the house, and fired several shots from guns, and used threatening, abusive, obscene and profane language toward plaintiff and his companion, about as aforesaid, and saying in addition, as they went into said house, "Just wait, they will come out, and we'll finish them up," and "Good thing you got in there, or we would have fixed you," or words to that effect, and warning them not to come out of said house, threatening to take their lives, saying, "If you come out we'll kill you," or words to that effect.

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3. Plaintiff further states, that from the effects of the injuries received as aforesaid at the hands of said mob he became almost prostrated and unconscious, and was compelled to, and did employ a physician to care for his wounds and said injuries, and was compelled to go to bed and remain there off and on in the daytime for about ten days, under the care and attention of a nurse and physician; that aside from suffering great physical and mental pain from bodily injuries as aforesaid, he suffered great mental pain and anguish from the threats and actions of said mob in their endeavor to take his life; that he has resided for several years with his family, consisting of his wife, two daughters and himself, in the city of I., and has carried on the occupation of a carpenter, and that he and his said family prior to said injuries bore a good reputation in the community where they resided, but by reason of the great insult and indignity of being stoned in the public streets of said city by said mob as aforesaid, his character and reputation, and the character and reputation of his said family have been injured, for all of which pain and suffering he has been damaged in the sum of at least \$.; that from the effects of the blows received, and from the extreme nervous and physical strain in his endeavor to flee from said mob and to reach a place of safety, his nervous system was permanently injured, and by reason of the blow upon the ear as aforesaid he is at times almost entirely deaf, and his hearing is gradually failing, resulting in a further damage to plaintiff in the sum of \$.; that he was caused to lose about six weeks time, of the reasonable value of \$., and to incur an expense for a physician and medicines in the sum of \$., making an aggregate damage to plaintiff by reason of the injuries aforesaid of the sum of \$.

4. Plaintiff further states, that on the day of, 19.., he presented his verified and itemized statement of account of said damages as aforesaid to the city council of the city of I., which said account on the day of, 19.., was wholly disallowed by said council, a full, true and correct copy of said account being attached hereto, filed herewith, marked "exhibit A" and made a part hereof.

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Wherefore plaintiff prays judgment against said defendant for the sum of dollars for costs of suit, and all other relief to which he may be entitled.²⁵

574. ACTION AGAINST A CITY ON A BOND ISSUED AGAINST A LOT FOR SPECIAL IMPROVEMENTS.

Plaintiff for his cause of action states: That the defendant is and for more than ten years last past has been duly incorporated under the laws of the State of Kansas as a city of the first class under and by the corporate name of "The City of A."

That on or about the day of, 19..., the said defendant entered into a contract with one J. E. to macadamize C. street from the west line of N. street to the east line of U. or T. street, a copy of which contract is hereto attached, marked "exhibit A" and made a part hereof, except that the same refers to certain specifications for the performance of said work which are in no wise material to this case or to the determination of any issues therein, and are therefore not hereto attached.

That said J. E. duly performed all of the conditions of said contract on his part, and the said work so done and performed by him under and by virtue of the terms of said contract was duly inspected and examined by the city engineer, whose report was duly approved, and said contract and the work thereunder accepted by said defendant , 19... That on , 19..., said defendant by its mayor and clerk issued to the said J. E. or bearer, a series of

²⁵ From form in record in *City of Iola v. Birnbaum*, 71 Kan. 600.

The statute providing for the recovery of damages against cities on account of the acts of mobs, whether such damages shall be loss of property or injury to life or limb (Gen. Stat. Kan. 1909, sec. 2933), applies to all bodily injuries, and is not limited to such as result in death or the loss of a limb. *Iola v. Birnbaum*, 71 Kan. 600.

It is no defense to an action brought under that statute to show that the city was unable to prevent the injury. *Iola v. Birnbaum*, 71 Kan. 600.

Where members of a charivari party injured a bride and groom, it was held to be within the statute making city liable for injury by mob. *Cherryvale v. Hawman*, 80 Kan. 170.

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orders upon the city treasurer of said city of A., for the payment by said treasurer of the indebtedness of said city to said J. E., of which orders (called special improvement bonds), except as to number, amount, and description of lot, a copy is hereto attached marked "exhibit B" and made a part hereof.

Plaintiff further says that the said defendant claiming and pretending that it was not liable upon said contract, made said orders above referred to and described, and thereon and thereby promised and agreed to levy assessments upon said real property above described for the payment of said several orders; but the said defendant wholly failed, neglected and refused to make a just, legal and lawful assessment of said lots, and wholly failed, neglected and refused to cause a lawful, legal and proper tax to be levied thereon for the payment of said indebtedness so specified in said orders. And this plaintiff alleges that in all said proceedings the said city engineer, mayor and clerk were duly authorized to do and perform the several acts above stated as having been done and performed by them in and about the making of said contract, and the accepting and receiving of the same. Plaintiff further says that the aggregate amount of said orders was and is the sum of \$. That afterwards and on or about the day of, 19.., plaintiff purchased of and from said J. E. each and all of said foregoing orders or warrants, and ever since has been, and now is the just, true and lawful owner and holder thereof; and therein and thereby the said J. E. did assign, transfer and set over to this plaintiff all his rights, claims and interests against said city growing out of or arising under his said contract and the said warrants and orders so executed and delivered to him. Plaintiff further says that the said orders or warrants by the face thereof could not become due at an earlier day than the day of, 19.., for that until that time no tax could have been levied upon said real property above described for the payment of said indebtedness, collected and paid over to said treasurer of the city of A., upon whom said orders and warrants were drawn. Plaintiff further says that he has caused

due and legal demand to be made upon the treasurer of said city of A. for the payment of said indebtedness, and the said treasurer wholly failed and refused to pay the same, or any part thereof.

That afterwards the plaintiff presented to the mayor and council of said defendant his duly verified claim and demand for the full payment of said amount so due to him, payment whereof was by the said mayor and council refused and denied, and said claim was by them wholly rejected. Plaintiff further says that under and by the terms of said contract so made by and between said J. E. and the defendant, the said defendant became and was liable to pay said indebtedness so by it contracted for the said macadamizing of said street, and the same became and was a just and legal claim and demand against said defendant, and the said defendant has wholly failed, neglected and refused to pay the same or any part thereof.

Wherefore, by reason whereof the said defendant has become indebted to the plaintiff in the sum of \$....., with per cent. interest thereon from 19..., for which sum, with interest and costs of suit, plaintiff prays judgment.²⁶

575. ACTION AGAINST A MUNICIPAL CORPORATION FOR DAMAGES FOR INJURIES ARISING FROM DEFECTIVE SIDEWALK.

Plaintiff states that on the day of, 19..., and for a long time prior thereto, the defendant was and now is a municipal corporation, organized and existing under the laws and statutes of the State of, and as such municipal corporation was and now is a city of the class, having all the powers and subject to all the responsibilities conferred and imposed by law upon cities of that class, including a right to sue and be sued, to plead and be impleaded in all actions of law; that as such city, it became and was its duty to keep its streets and sidewalks in good repair, and safe condition for travel by pedestrians traveling upon its streets and sidewalks at all times.

²⁶ From form in record in *Atchison v. Friend*, 78 Kan. 30.

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That on the said day of, 19.., A. street in said city, and the sidewalk pertaining thereto constituted a public highway of said city of P. B. and was one of the main traveled streets and thoroughfares in defendant city; that on the north side of A. street, in and upon the sidewalk there being, there were loose and rotten boards, in and upon said sidewalk upon said street, that said loose and rotten boards were dangerous to pedestrians traveling along and on said sidewalk; that said loose and rotten boards had been and remained in said sidewalk for a period of more than months, which defendant knew of, by its officials, agents or servants, or might have known of, by the exercise of ordinary care and caution; but that the said defendant by its agents, servants and officials, negligently permitted the same to remain in said dangerous condition to the traveling public.

Plaintiff further states that in the afternoon of said day of, 19.., at or about the hour of o'clock, this plaintiff, while using due care and caution, and walking upon said sidewalk, on the north side of A. street, between said F. and streets, in said city of P. B., stepped on said loose and rotten board, in said sidewalk, and was precipitated and fell, and was thereby, etc. (state injuries); that by reason of the negligence of said defendant city in leaving said sidewalk in said dangerous condition, the plaintiff was injured (nature of injuries and extent of damages), to his damage in the sum of dollars, and for which defendant by its negligence is liable, and for which plaintiff sues and asks judgment in the sum of dollars together with costs.

576. ALLEGATION OF NEGLIGENCE FOR DAMAGES DUE TO DEFECTIVE SIDEWALK.

Plaintiff states that defendant's sidewalk on the east side of M. street was defective, in that the stringers and boards out of which the sidewalk was constructed were old, rotten and decayed, and the boards that made the covering were unnailed and liable to become misplaced and were uneven and of different thicknesses; that she, while walking along at the usual and ordinary gait, by reason of the dangerous and de-

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fective condition of said walk, stepped on a loose board, which flew up and let her through said sidewalk, which had the effect of bruising her hand and leg and thigh and wrenching her back, and internally injuring her; that the sidewalk had been out of repair long enough for the defendant by the exercise of ordinary care to have known of its defective condition.

577. ALLEGATIONS OF DEFECTIVE CONSTRUCTION OF SIDEWALK AND ALLOWING IT TO BECOME AND REMAIN IN A CONDITION UNSAFE FOR USE.

The said sidewalk was by the defendant negligently allowed to be defectively constructed and to become and remain out of repair, and in a condition dangerous to those walking thereon; that the said sidewalk is composed of boards nailed upon two stringers and said stringers were negligently allowed to be placed about eight inches from the ends of the boards, leaving as much as eight inches of the ends of the boards extending outward beyond the stringers, and the stringers were composed of defective material, which was old and decayed, and said stringers were pieced and patched with old pieces leaving the same defective and unsafe; that the boards of said sidewalk were negligently allowed to become and remain loose on the stringers to which they had been nailed.

578. ALLEGATIONS OF NEGLIGENCE IN ACTION FOR DAMAGES FOR INJURY FROM FALLING IN UNGUARDED HOLE EXISTING ALONGSIDE THE SIDEWALK.

Plaintiff states that on the night of, 19.., the plaintiff was lawfully passing southeast on said A. avenue and the said sidewalk thereof, about a half block north of the intersection of A. and St. L. avenues in the city of, when she fell into an open and unguarded hole or depression existing in said street alongside the sidewalk, a way upon which the plaintiff was walking, and was injured; that said hole or depression in said street was well known to the defendant and its officers and agents in charge of keeping said street in repair, and defendant and its servants, by the exercise of ordinary care, could and would have repaired said

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street before plaintiff's said injury, yet neglected to do so, and thereby directly contributed to cause plaintiff's said injuries.

579. PETITION FOR PERSONAL INJURIES BY DRIVER OF WAGON BEING THROWN THEREFROM BY REASON OF A DEFECTIVE STREET.

The plaintiff states that at the times herein mentioned the city of was and now is a municipal corporation by virtue of the law of the State of That at said time avenue, at the places herein mentioned, was an open public street within the city of, graded and paved as such. That on the day of, 19..., the plaintiff was driving a wagon and team, northward upon said avenue, and when at a point in said street just south of avenue bridge, his wagon and the wheels thereof came in contact with an obstruction in said street, to-wit, a hole, ditch, an excavation worn into said street, whereby the plaintiff was caused to be thrown from said wagon to the street, and said wagon and the wheels thereof ran against and upon the plaintiff, whereby plaintiff was greatly (allege injuries).

Plaintiff avers that said street at said place was, by reason of said obstruction out of repair and in a dangerous and defective condition, as defendant, by its agents having charge of keeping said street in repair, well knew before plaintiff's said injuries, or would have known by the exercise of ordinary care in time to have repaired the same before plaintiff's said injuries, yet neglected to do so. That by reason of his injuries so sustained the plaintiff has suffered (aver extent of injuries, damages, etc.).

Wherefore, etc.

CHAPTER XLVI.

NEGLIGENCE.

- 580. Action against a railroad company for damages for injuries received by falling into a hole or excavation negligently left unguarded in a way or street used by pedestrians in going to the depot.
- 581. Action for damages for negligently constructing a railroad embankment so as to cause the water to overflow upon plaintiff's land and damage his crops.
- 582. Allegations of negligence in running a train at a high rate of speed in violation of a city ordinance.
- 583. Action for damages caused by negligently leaving the steps to the entrance to plaintiff's house loose so that they fell and plaintiff was injured.
- 584. Action against telegraph company for actual damages and statutory penalty for failure to transmit a message. Comp. Laws Okla. 1909, sec. 519.
- 585. Action for damages against a telegraph company for failure to transmit and deliver message without delay.
- 586. Action against telegraph company for damages for negligently delaying the delivery of a message to the plaintiff.
- 587. Action against telegraph company for damages for failure to transmit and deliver message.
- 588. Action for damages resulting from the death of the son of plaintiffs, by being crushed in a mine shaft through the negligence of defendant's servant in not properly managing the hoisting machinery.
- 589. Allegations of negligence in action for damages by an employee at an elevator, who was injured by switching of cars upon side track where he was working.
- 590. Allegations of negligence in action for damages for injuries caused by the defendant carelessly pushing another car against the one in which plaintiff was at work.
- 591. Action for damages caused by fire being communicated to plaintiff's property, which was started by the defendant setting fire to a prairie.
- 592. Allegations of negligence in action for damages by widow as administratrix of her husband's estate who was killed while performing his duty as a brakeman.

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- 593. Allegations of negligence in an action by parents against street railway company for damages for killing minor son.
- 594. Action for damages for injuries received by coming in contact with a guy wire of a pole carrying heavily charged electric wires.
- 595. Action for damages by reason of being bitten by a wolf negligently allowed to run at large by the keeper.
- 596. Allegations of negligence in an action to recover for personal injuries sustained by being thrown from a wagon as he was driving into the grounds of the defendant.
- 597. Allegations of negligence in an action for damages for wrongful death of an employee in a coal mine.
- 598. Allegations of negligence in action against steam railway company for damages for an injury caused by being struck by moving train.
- 599. Allegations of negligence in action for damages for injuries sustained by reason of team becoming frightened when approaching a railway crossing.
- 600. Allegation of negligence in action for death of infant run over by street car drawn by mules.
- 601. Allegations of negligence in an action for damages against a railway company for injuries received by being caught while passing between the cars where an opening had been made to allow persons to cross the track.
- 602. Allegation of negligence in action by minor for personal injuries received while attempting to pass between cars of a train occupying a street crossing.
- 603. Allegation of negligence in case of collision of horse and buggy with pedestrian.
- 604. Specific allegations of negligence where automobile collided with buggy, killing occupant (action by widow).
- 605. Action for damages for death of husband alleging negligence in allowing electric wires to become broken and remain in the street where deceased was killed.
- 606. Action for damages for injury resulting from negligence in sale of poisonous drug without labeling as such, by agent of defendant.
- 607. Action for loss of team and wagon negligently precipitated in a river while employed in rip-rapping and hauling.
- 608. Action for damages resulting from excavating for foundation by an adjoining owner.
- 609. Allegation of negligence of title examiner in examination of title.
- 610. Action against the owner of premises for damages sustained by one not a tenant alleging that the premises were in bad repair at the time they were rented.
- 611. Allegation of negligence in action for damages for maintaining

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an iron grating of which the bars were broken, in the sidewalk in front of defendant's premises.

612. Action for damages for injuries resulting from an explosion of chemicals.

CARS COLLIDING WITH VEHICLES.

613. Petition where street car negligently colliding with wagon, injuring plaintiff, charging violations of ordinance, as to speed, vigilant watch, etc.
614. Action for damages due to collision of street car with wagon driven by plaintiff, where the wheels went into a hole in the street, alleging failure to observe vigilant watch ordinance.
615. Allegation of negligence in case of street car colliding with buggy.
616. Action by one riding in a hired livery carriage due to collision of electric car run in violation of a municipal ordinance as to lights on the car, dangerous speed and failure to keep a vigilant watch.
617. Allegations of negligence in an action where person was struck at a crossing and killed by a passenger engine.
618. Allegations of negligence where the driver of a wagon was struck while crossing a street car track.

COLLISION OF STEAM AND STREET CARS WITH PEDESTRIANS.

619. Allegations of negligence where deceased while upon the track of defendant was struck and killed.
620. Same—Another form.
621. Action by parents for damages for death of child, caused by being struck by cars while attempting to cross tracks.
622. Allegations of negligence in an action where plaintiff was injured by being struck by motor car at a street crossing.
623. Allegation of negligence where street car collided with pedestrian at crossing, charging negligence and violation of vigilant watch ordinance (action by wife).
624. Allegations of negligence where street car struck pedestrian who fell unconscious upon car track.
625. Allegation of negligence where train struck pedestrian while crossing street.

580. ACTION AGAINST A RAILROAD COMPANY FOR DAMAGES FOR INJURIES RECEIVED BY FALLING INTO A HOLE OR EXCAVATION, NEGLIGENTLY LEFT UNGUARDED IN IN A WAY OR STREET USED BY PEDESTRIANS IN GOING TO THE DEPOT.

Comes now the above named plaintiff and by his attorneys hereunto subscribed, complains of the defendant and for his cause of action against it alleges:

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That said defendant is now and at all times herein mentioned was a railroad corporation, incorporated under the laws of the State of, and is now and at all times herein mentioned was, as such railroad company, doing business under and by virtue of the laws of the State of

That as such railroad corporation, said defendant owns, uses and operates a line of railroad into and through the city of P. and through the county of N. in the said State of and within the said city of P., has its main track and its several side tracks and its station and station grounds and depot within and for the said city of P.

That among other points so intersected and crossed by said railroad right of way and tracks are "B" street and "C" street in said city of P., the said streets and each of them being public highways and thoroughfares of the said city; that the passenger depot, freight depot and depot grounds of said company are located and situated between said "B" street and said "C" street and open out upon and into each of the said streets thereof.

That on or about the day of, in the year 19.., upon the depot grounds of said defendant company immediately north of the said "B" street and within a few feet of the north line of said street, in a direct line with said street and defendant's depot grounds and passenger depot, and said defendant company did have, keep and maintain a large deep well, hole and excavation about six feet wide and about six feet long and about seven feet deep and walled with stone, brick and other material; that said hole then was and now is about fifteen to eighteen feet west of the main track of the said railroad of the said defendant company being on the same side of the track with the said passenger and freight depots.

That on or about the day of, in the year 19.., and from day to day theretofore, for and during several days of time (but for the definite term and period of which this plaintiff is not informed and does not definitely know, but which plaintiff believes and therefore alleges the fact to be had in fact continued for several weeks), the said

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defendant did knowingly, wrongfully, willfully, carelessly and with gross and extreme negligence and indifference, and with insolent disregard for the public safety, keep and maintain said hole and excavation open, exposed and uncovered and that said defendant well knowing of the existence of said hole and of its dangerous character and condition did further willfully, carelessly, and with gross and extreme negligence and cruel and insolent indifference to the safety of the public, fail, neglect and refuse to place any guard, rail, obstruction, hindrance, or other enclosure around the same and did further fail, neglect and refuse to cover over said hole and excavation and did further fail, neglect and refuse to place any light or other warning at or in the vicinity of said hole or excavation and so failing, neglecting and refusing, in each and all of the several matters hereinbefore stated and so leaving the same so exposed and open from day to day the said condition continued up to and including the night of the day of, 19...

That said defendant was further guilty of gross, wanton and extreme carelessness and negligence in this, to-wit, that for several years prior to the summer of 19.. the traveling public had used the said "B" street as a means of approach to the said depot grounds and freight and passenger depots of the said defendant company, and that well knowing that said excavation was then and at all times in the usual path and way of travel from the said "B" street thereto, the said defendant did carelessly place said excavation in the said line of accustomed travel a few weeks or days before the day of, 19.., the exact time being unknown to this plaintiff, and did carelessly, negligently and indifferently leave open and uninclosed and subject to its accustomed use, the said line of travel and approach to the said premises and depots of the said defendant company, all of which said facts were at all times well and fully known to the said defendant and were wantonly and willfully permitted to be and continue up to and including the night of the day of, 19...

That on the night of the day of, 19.., this plaintiff being wholly ignorant and uninformed of the existence

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of the said hole and excavation and not knowing of the presence and whereabouts and location of the said hole and not knowing that the passage to the depot and depot grounds from said "B" street was in any manner obstructed, and plaintiff being upon said "B" street and desiring to go to the depot grounds upon business and believing the said approach to the depot was safe and secure and in good and roadworthy condition and was used as a means and way of travel did, at or about the hour of half-past ten o'clock in the nighttime of said day, travel and pass upon and along said "B" street to the position of said street south of said passenger depot lying just immediately west of the main track of said defendant's road and upon the premises of said defendant and did attempt to pass lawfully and rightfully to said passenger depot and along said premises thereto did fall head first into the said hole and upon the stone bottom and sides of said excavation with great force and violence and did thereupon strike plaintiff's head, right leg and right forearm and right wrist and right hand.

That the said fall and concussion of plaintiff upon and against the sides and bottom of said ditch and upon the stones at the bottom thereof caused great physical injury and corporal hurt to plaintiff (describe injuries).

Plaintiff further alleges that by reason of the aforesaid injuries so inflicted upon plaintiff as aforesaid, plaintiff has been damaged in the suffering of said physical pain and distress of body caused thereby in the sum and amount of dollars; that plaintiff has thereby and therefrom suffered the further damage of dollars by reason of the attendant mental suffering, agony and anguish of mind occasioned by said injuries.

That plaintiff has suffered the further damage, by being put to the expense of a large indebtedness and expenditure for medical attendance heretofore incurred and now continuing to accumulate in the sum of dollars.

That plaintiff has been further damaged in the loss of time, in labor for one and one-half months of the reasonable value of dollars per month now aggregating dollars

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and still continuing to incapacitate plaintiff from labor, and that plaintiff will continue to suffer said loss from month to month hereafter and the same is a continuing damage in the sum of dollars per month.

Plaintiff further alleges that he is damaged by reason of his impaired and injured physical health, strength and stamina in the sum and amount of dollars.

Plaintiff further alleges by reason of the extreme, gross and wanton negligence and carelessness of said defendant and by reason of defendant's gross and extreme disregard for the safety of this plaintiff in common with the public generally, this plaintiff is entitled to recover of and from defendant a reasonable amount and sum by way of exemplary and punitive compensation and damages in the sum of dollars.

Wherefore plaintiff prays judgment against defendant in and for the sum and amount of his damages herein, to-wit, the sum of dollars as compensatory damages, and the further sum of dollars exemplary and punitive damages, aggregating in all the sum and amount of dollars, and for costs of suit.¹

¹ From form in *Atchison, Topeka and S. Fe. Ry. Co. v. Jandera*, 24 Okla. 106.

A general allegation of negligence is not sufficient either in a petition or an answer, and a pleading containing a general allegation of negligence is subject to a motion to make more definite and certain. *Price v. Atchison Water Co.*, 58 Kan. 551; *Atchison, T. & S. F. Rd. Co. v. O'Neill*, 49 Kan. 367.

A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Chicago, R. I. & P. R. Co. v. O'Donnell*, 72 Neb. 900; *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.

A general allegation of negligence is sufficient, if not attacked by motion. *Burnham v. Chicago, B. & Q. R. Co.*, 87 Neb. 696; *Union P. R. Co. v. Vincent*, 58 Neb. 171; *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747.

Evidence of an ordinance of a city, regulating the rate of speed of street cars, is admissible under a general averment of negligence. *Omaha Street R. Co. v. Larson*, 70 Neb. 591.

In the statement of a cause of action for negligence, where the charge is vague and general, a motion to require the pleading to be

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581. ACTION FOR DAMAGES FOR NEGLIGENTLY CONSTRUCTING A RAILROAD EMBANKMENT SO AS TO CAUSE THE WATER TO OVERFLOW UPON PLAINTIFF'S LAND AND DAMAGE HIS CROPS.

Comes now the plaintiff in the above entitled action, and complaining of the defendant alleges and says:

made more definite and certain, should be sustained. *St. Louis & San Francisco Ry. Co. v. French*, 56 Kan. 584.

A petition alleging negligence in general terms may be amended so as definitely to set forth the facts constituting such negligence, although the statutory period of limitation for the bringing of such an action has expired when the amendment is made. *Missouri Pacific Ry. Co. v. Moffatt*, 60 Kan. 113.

A petition in an action for personal injuries that states facts and circumstances from which the inference of negligence by the defendant is inevitable is not defective for omitting the use of the word "negligence," or its derivatives. *Geneva v. Burnett*, 65 Neb. 464.

A petition which alleged that the deceased was killed through the negligence of the railroad company while being transported as a passenger, may be amended to allege that deceased was killed while being transported as an employee. *Kansas Pac. Ry. Co. v. Salmon*, 14 Kan. 390.

A petition in an action for damages stating a common law liability, cannot be amended so as to state a cause of action for wrongful death under the statute, the amendment being offered more than two years after the death occurred. *Kansas City v. Hart*, 60 Kan. 684.

Plaintiff cannot recover on any ground of negligence not alleged in his petition. *St. Louis & S. F. Ry. Co. v. Elrod*, 78 Kan. 868.

The doctrine of comparative negligence is not recognized in Kansas. *Mo. Pac. Ry. Co. v. Walters*, 78 Kan. 39.

To constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements. *Langenfeld v. Union Pac. R. Co.*, 85 Neb. 527.

The specific negligence complained of by plaintiff must be alleged in the petition and the recovery must be had upon such allegations. *Schwarzschild & Sulzberger Co. v. Weeks*, 66 Kan. 800.

A petition containing general averments of negligence "as hereinafter more specifically mentioned and described" presents only such issues as are found in the specific allegations. The averment that a passenger-train was running at a rate of speed of about sixty miles an hour is not *per se* an allegation of negligence. *Chicago, Rock Island and Pacific Ry. Co. v. Wheeler*, 70 Kan. 755.

Where a petition in a personal-injury case alleges a specific act of negligence by one of three designated agents of the defendant, it is not

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1. That the plaintiff now is and at all times hereinafter mentioned was the owner and in the peaceable possession of the (describe real estate) in C. county, O.; and that the defendant now is and at all times hereinafter mentioned was a railroad corporation duly organized and existing under and by virtue of the laws of the State of, and doing business

subject to a motion to make the allegation more definite and certain by pointing out which of such agents is claimed to have committed the act when it is also averred that plaintiff has no further information, and such averment is not shown to have been made in bad faith. *Atchison, Topeka & Santa Fe Co. v. Davis*, 70 Kan. 578.

Where a party charges, in an action for personal injuries, a specific act of negligence as a ground for damages, he is concluded thereby, and cannot recover upon other grounds of negligence not alleged. *Telle v. Leavenworth Rapid Transit Co.*, 50 Kan. 455.

A petition in an action against a railroad company for personal injury, growing out of the alleged negligence of the servants of the company, must show to which servant or servants of the company negligence is imputed, and fully and definitely state what acts or omissions of such servants constitute the negligence complained of. *Atchison, T. & S. F. Ry. Co. v. O'Neill*, 49 Kan. 367.

Negligence in running train at high rate of speed, in action to recover for killing person at crossing, must be alleged if that ground of negligence is relied upon. *Mo. Pac. Ry. Co. v. Moffatt*, 56 Kan. 667.

In an action by the parents to recover damages for the death of a minor child, caused by being run over by a street-car, a petition that avers that the child came to his death by the defendant's employees' carelessly, negligently, recklessly and wantonly running the car upon and over the body of the child, instantly killing him, is sufficient in its allegations to sustain a verdict for damages, notwithstanding a special finding that the injury was not inflicted through the reckless and wanton neglect of the defendant's employees in charge of the car. *Southwest Missouri E. Ry. Co. v. Fry*, 71 Kan. 736.

Failure to maintain gates at a railroad crossing, as required by ordinance cannot be made a ground of recovery unless alleged in the petition. *Atchison, T. & S. F. Ry. Co. v. Shaw*, 56 Kan. 519.

Necessary allegations where death occurred in another state, by reason of negligence. *St. Louis & S. F. Ry. Co. v. Johnson*, 74 Kan. 83.

Defendant's negligence is not admitted where the answer denies generally and then pleads contributory negligence on the part of the plaintiff. In such case the plaintiff is not relieved from proving negligence on the part of defendant, nor is defendant prevented from disproving it. *Leavenworth Light and Heating Co. v. Waler*, 65 Kan. 514.

A petition which alleges that defendant set out a fire on his premises, that it spread to plaintiff's premises and damaged plaintiff, without an

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as a railroad corporation in C. county, O.; and that the defendant's railroad, right of way, ditches and embankment extend and did at all times mentioned extend across and through this plaintiff's land above described and for some distance on either side of same.

That the defendant, prior to the dates herein mentioned, allegation of facts showing negligence on the part of defendant, does not state a cause of action. *Vansyoc v. Freewater Cemetery Ass'n*, 63 Neb. 143.

In an action against a father for damages resulting from the setting out of a fire by his minor sons it is not a sufficient allegation of the parent's liability to allege that the sons "while they were engaged in his (the father's) business, and for his benefit and working for him, purposely, carelessly and negligently set out a fire." It is necessary to allege, in substance, if done in the absence of the father and without his direction, that the setting out of the fire was a service being rendered for the father or resulting from an act done in such service; in other words, that the fire was set out or caused by an act within the scope of the employment. *Mirick v. Suchy*, 74 Kan. 715.

Allegation that defendant corporation did certain things by its foreman is a sufficient allegation of the latter's authority, as against an objection to all evidence at the trial. *Swift & Co. v. Bleise*, 63 Neb. 739.

Where a corporation engaged in the wholesale distribution of coal oil, by accident mingles and mixes gasoline with same, and sells the same to the general trade as pure and standard grade oil, without notice, such sale is an act of negligence for which it would be liable in damages. *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107.

Negating contributory negligence. In an action for damages in order to negative contributory negligence it is sufficient if there is a general allegation that such injuries were received without fault or negligence on the part of the plaintiff. *Chicago, St. P. M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566.

Under the Code of Civil Procedure of Okla. contained in the statute of 1890 which was adopted from the statute of Indiana, a complaint for injury done to the property by the negligence of another, was insufficient, which did not allege that the plaintiff himself was without fault. *Guthrie v. Nix, Halsell & Co.*, 3 Okla. 136.

In an action to recover damages for personal injuries, alleged to be caused by the negligence of another, it is not necessary for the plaintiff, in his petition, to plead the particular precautions he took to avoid injury. *Chicago, B. & Q. R. Co. v. Putnam*, 45 Neb. 440.

Where an action is brought by an administrator against a stock yards company for the death of a switchman, caused by defects in the railway track, it is unnecessary to allege in the petition that he had no knowledge of these defects. That is a matter of defense which, to admit

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and before the causes of action herein referred to accrued, did enlarge and change its culverts and enlarge and extend its ditches, extending along the side of the embankment herein referred to, so that said ditches extending through and beyond the confines of the plaintiff's farm gathered the water in time of heavy rains and storms from other and adjoining land and from the defendant's land and wrongfully turned it down through said culverts upon the plaintiff's land in unnecessarily great quantities.

Plaintiff states that if it were not for the railroad, right of way, embankment, culverts and ditches complained of in this petition, the water naturally flowing upon and across plaintiff's land, would flow off in even quantities from the same so as to do no damages.

Plaintiff alleges that on or about the day of, 19.., and at all other times, prior to the accrual of this cause of action, he requested the defendant to remove the nuisance herein complained of, but the defendant has at all times refused and neglected so to do and continues the same.

That at all times mentioned herein, the defendant had notice of the nuisance herein complained of.

2. That on or about the day of, 19.., the water accumulated by the defendant's railroad, ditches and embankments as set out in paragraph one, did in great volume and with great force as the result of the continuing, by the defendant of its aforesaid road, ditches, embankment, and enlarged and changed culverts as aforesaid, run down through the holes, cuts, or culverts in the defendant's said road and embankment on to the plaintiff's farm, thereby injuring and damaging (set out crops damaged), and that the said water flowing as aforesaid damaged plaintiff's aforesaid land in the sum of \$..... That no part of said damage has been paid.

proof, must be pleaded. Union Stock Yards Co. v. Conoyer, 38 Neb. 488.

In pleading the character of an injury it is not necessary to give a specific catalogue of every incident or subordinate result flowing therefrom in order to introduce proof of such results; but the pleading of such injury will permit proof of all results which naturally and proximately ensue therefrom. Cudahy Packing Co. v. Broadbent, 70 Kan. 535.

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Wherefore, plaintiff prays judgment against defendant in the sum of \$. and for costs of this action and for such other relief as the court may deem just and proper.²

582. ALLEGATIONS OF NEGLIGENCE IN RUNNING A TRAIN AT A HIGH RATE OF SPEED IN VIOLATION OF A CITY ORDINANCE.

Plaintiff further alleges that on said day of, 19.., and ever since the year 19.., there existed in the city of L. an ordinance governing the rate of speed at which trains, engines, cars, and trucks should be run over the railroads within the corporate limits of the said city of L. and providing for regulating the use of bells upon such engines and providing penalties for the violation of such ordinance, and that the section or paragraphs 2 and 10 of such ordinance are as follows, to-wit: (here insert certain paragraphs of such ordinance).

That said ordinance was in full force and effect in said city of L. on said day of, 19.., and was passed by the city council and duly approved by the mayor and was duly published and became a law for the said city of L. on the day of, 19.., and has remained in full force and effect therein ever since that date.

Plaintiff further alleges that the point at which the injury above complained of took place is within the corporate limits of the city of L. and is near the central portion of said city and that the injury to the plaintiff was the direct result of the violation of said ordinance in this, to-wit: that the defendant was, in violation of said ordinance, running its said engine at a high rate of speed in its said yards within the corporate limits of the city of L. at the time it so struck and injured this plaintiff and that said high rate of speed and said violation of said ordinance was one of the direct and proximate causes of the plaintiff's said injuries.³

² From form in *Chicago, Rock Island and Pacific Railway Company v. Johnson*, 25 Okla. 147.

³ From form in record in *Chicago, B. & Q. Ry. Co. v. Troyer*, 70 Neb. 287.

583. ACTION FOR DAMAGES CAUSED BY NEGLIGENTLY LEAVING THE STEPS TO THE ENTRANCE TO PLAINTIFF'S HOUSE LOOSE SO THAT THEY FELL AND PLAINTIFF WAS INJURED.

Comes now the plaintiff and for cause of action against the defendant alleges:

That on the day of, 19.., and for a long time prior thereto, plaintiff occupied the dwelling house known as "K" street, S. O., Nebraska, situated on (describe property) in D. county, Nebraska, as the lessee of the defendant; that while plaintiff was in peaceable possession of said premises as the tenant of the defendant, the defendant came upon the premises without the consent of the plaintiff and commenced to raise up off of the foundation, the house on said premises occupied by the plaintiff and her children as a dwelling house, and also commenced to move said house off of the lot; that while raising and moving said house, defendant took away the front steps of the house leading from the front door of said house to the ground, which steps plaintiff was obliged to use in passing in and out of said house; that defendant immediately replaced said steps in their former position for the use of this plaintiff and her children in going to and from said house, but defendant negligently and carelessly failed and neglected to fasten said steps as they had been previously fastened, but negligently left them loose and in an unsafe condition; that plaintiff had no previous knowledge of their loose and unsafe condition, for previous to their having been removed and put back by the defendant, they had been in continuous use by this plaintiff and her family and had been in a safe condition for such use, and the plaintiff had reason to believe and did believe that said steps were placed safely and securely in position and in safe condition for the use of herself and family; that plaintiff, while passing out of the house and over and upon said steps on the day of, 19.., did, by reason of the negligence of the defendant, sustain a severe and permanent injury; that said steps turned over with plaintiff upon them, throwing plaintiff to the ground with great force, and dislocating her left arm at the elbow, plaintiff being rendered almost uncon-

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scious as the result of the severe fall; that the plaintiff's arm was so severely injured that she has had very little use of it since; that she has reason to believe and is informed by her physician that she will never recover from the effects of her injury, but that the same is permanent; that plaintiff's arm was in a sling for over ten weeks and she was confined to the house for over two months; that plaintiff suffered great bodily pain and mental anguish as a result of said injury, and continues so to suffer; that plaintiff is a widow with five minor children dependent upon her for support; that plaintiff is forty-two years of age and previous to the injury complained of, was a strong, healthy woman, able to do all her own housework and to earn not less than per day in addition thereto; that since said injury, plaintiff has not been able to do her own work or to earn anything, but has been compelled to keep at home one of her oldest children to do the housework; that said child was earning per day, which amount was turned over by said child to plaintiff; that by reason of this injury, plaintiff has been and will continue to be deprived of this income.

That plaintiff has incurred an indebtedness of dollars for medicine and medical attendance, for the treatment of said injury complained of.

That by reason of the negligent acts of the defendant herein complained of, this plaintiff has been damaged in the sum of dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of dollars and costs of suit.⁴

584. ACTION AGAINST TELEGRAPH COMPANY FOR ACTUAL DAMAGES AND STATUTORY PENALTY FOR FAILURE TO TRANSMIT A MESSAGE. COMP. LAWS OKLA. 1909, SEC. 519.

Comes now the plaintiff, by his attorneys, S. & R., and for cause of action against the defendant, the W. U. T. Co., says:

1. That the defendant, the W. U. T. Co., was, at the time of the grievance hereinafter stated, and is now, a corporation duly organized and incorporated under the laws of the State

⁴ From form in record in Doyle v. Franek, 82 Neb. 606.

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of, and as such was doing business in the State of, and was, and is now, owning and operating a telegraph line in the State of, from the town of G., G. county, Oklahoma, and extending through the State of Oklahoma and into the State of Kansas to the town of P., Kansas, and that the said W. U. T. Co. was then, and is now, engaged, as a common carrier for hire, in sending messages for the public, by means of such telegraph between said town of G., Oklahoma, and P., Kansas.

2. Plaintiff further states, that on the day of, 19.., plaintiff, by his duly authorized agent, J. B. L., delivered to the defendant, its agent and employee, a certain telegraphic message, which message defendant accepted and agreed to transmit and deliver without unnecessary delay, and which message was in words and figures following, to-wit : (set out message).

3. That the defendant, its agent and employee, grossly and maliciously neglected and failed to transmit said message to the said G. A. at P., Kan., and that, although the whereabouts of the said G. A. were well known to the defendant, its agent and employee, the said message was never delivered to him.

4. That the said G. A. had submitted, through one S. of G., Oklahoma, a proposition to purchase a well drilling cable weighing pounds of the plaintiff at ten cents per pound, and the plaintiff's duly authorized and acting agent, J. B. L., had delivered to said defendant the aforesaid telegram accepting said offer.

5. That the plaintiff by reason of the gross failure and neglect of the defendant to transmit and deliver said message to the said G. A. has been damaged in the sum of dollars, actual damage, as shown by an itemized verified account hereto attached, marked "exhibit A" and made a part of this petition, which account was duly filed with the agent and employee of the defendant at G., Oklahoma, on 19.., and which the defendant has wholly failed and refused to pay.

Wherefore, plaintiff prays that the defendant be cited in

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terms of law to answer this petition, and that upon final hearing hereof, plaintiff have judgment for dollars, actual damage, and for dollars, penalty as provided by law for postponing messages, all costs of this action, and such other and further relief as the court may deem equitable and proper.⁵

585. ACTION FOR DAMAGES AGAINST A TELEGRAPH COMPANY FOR FAILURE TO TRANSMIT AND DELIVER MESSAGE WITHOUT DELAY.

The plaintiff complains of the defendant and for cause of action alleges:

1. The defendant is and was at the times hereinafter mentioned a corporation duly organized and doing business in the State of Nebraska and was and is a common carrier of messages, and was and is operating a line of telegraph between the city of Y., in Y. county, ..., and the city of St. L., in the State of, and was and is engaged in the business of transmitting messages by wire for hire between said points, and it was and is the duty of defendant to transmit messages over its said line.

2. On and prior to the day of, 19.., plaintiff was engaged in the business of buying grain at various points in the State of Nebraska and selling and shipping the same to parties at St. L. and other points and among others to the firm of B. M. & Co., of said St. L., Mo., a firm of commission merchants doing a general business of buying and selling grain on commissions, and was selling grain among others for plaintiff.

3. On the day of, 19.., plaintiff received an offer from B. M. & Co. of St. L. by wire over defendant's line to sell for him bushels of No. 2 hard wheat, acceptance to be signified by 9.30 o'clock A. M. on the day of, 19.., and plaintiff thereupon immediately purchased bushels of wheat of the grade and description

⁵ From form in *Western Union Tel. Co. v. Coyle*, 24 Okla. 740.

"Every person whose message is refused" means the sender of the message; that is, the person whose name is signed thereto. *Western Union Telegraph Co. v. Coyle*, 24 Okla. 740.

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covered by said offer, and then and there had the same and was ready and willing and able to sell the same in compliance with said offer.

4. On the day of, 19.., at 7.52 A. M., plaintiff filed and delivered a message partially in cipher with the agent of the defendant at Y., Nebraska, in the words and figures following: (here copy message), and plaintiff then and there instructed said agent to transmit said message over defendant's said line and to deliver the same to the addressee at once. The agent to whom said message was delivered well knew said message was a grain message and had reference to a sale of grain and that the same was important and was of great value to plaintiff and that it involved a large amount of money and knew that the failure to transmit and deliver said message forthwith might result in great damage to plaintiff and the said agent then and there agreed for and in consideration of the charges prepaid to transmit and deliver the same at once and without delay, and it became then and there the duty of the defendant to transmit and deliver said message at once and without delay and the said defendant then and there agreed with plaintiff so to do and accepted said message with the understanding and agreement to transmit and deliver the same at once and without delay. That said addressees understood the meaning of said message and knew the same to be an acceptance of their said offer and an instruction to them to sell bushels of No. 2 hard wheat at cents per bushel.

5. Plaintiff alleges that if said message had been transmitted and delivered with ordinary reasonable promptness and dispatch the same would have been received by the said addressees before 9.30 o'clock A. M. of the day of, 19.., and the said B. M. & Co. could and would have sold said wheat for plaintiff at and for the price of cents per bushel in accordance with their said offer and the plaintiff would have delivered said wheat to the purchaser and would have received therefor the said sum of cents per bushel for said bushels, but by reason of the carelessness, negligence and delay of the defendant and its

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agents said message was not delivered to the said B. M. & Co. until about noon of said day and too late to sell said wheat in accordance with said offer and at the price of cents per bushel, and the said B. M. & Co. refused to confirm said acceptance and close said sale and did not sell said wheat for plaintiff and by reason of said negligence and delay of defendant, plaintiff was compelled to and did sell said wheat at cents per bushel, thereby incurring a loss of cents per bushel.

Wherefore plaintiff says he was damaged in the sum of \$.....

Wherefore, etc.*

586. ACTION AGAINST TELEGRAPH COMPANY FOR DAMAGES FOR NEGLIGENTLY DELAYING THE DELIVERY OF A MESSAGE TO THE PLAINTIFF.

The petitioner for his cause of action and petition herein against the defendant respectfully states and says:

That he is and at all the times set forth in the petition was a resident of the county of R. and the city of L., in the State of Kansas. That the defendant, the W. U. T. Co., was at all said times and now is a corporation organized under the laws of the State of and doing business as a carrier and deliverer of telegraphic messages for the public in the various states of the United States and was so engaged in transmitting and delivering messages in the States of Kansas and Missouri at the times hereinafter referred to in this petition.

Plaintiff further alleges that on the day of, 19.., which was, at about the hour of 7 o'clock in the morning of said day there was delivered to the said defendant for and on behalf of this plaintiff and for his benefit and to be transmitted by the said defendant and delivered to him at L., Kansas, and to be immediately so transmitted and delivered a certain message, a copy of which is hereto attached, which said message said defendant received for transmission over and by its telegraphic lines.

Plaintiff further alleges that at the time of delivering to the

* From form in record in Smith v. Western Union Telegraph Co., 80 Neb. 395.

said defendant the said message all the tolls and charges for the transmission thereof and for the delivery thereof by the said defendant was fully prepaid to it by the sender thereof for the plaintiff's benefit, to-wit, the sum of fifty cents, which said sum said defendant then and there received and accepted together with the said message for transmission.

Plaintiff further alleges that the sender of the said message, J. S., was plaintiff's brother-in-law and resided at N., Mo., the place from which said message was sent and at which it was delivered to the said defendant for transmission. That the person therein referred to as father was the father of plaintiff and who at said time resided and lived at N., Mo. The said message was sent for and on account of plaintiff and for his benefit and to inform him in regard to the condition of his father and concerning his father and in relation to his father's sickness. Plaintiff further alleges that said message stated and informed him that the father of plaintiff was very sick and conveyed to plaintiff the information that he should come to N., Mo., if he desired to see his father. That plaintiff's father was an old man and plaintiff had not seen him for a long time and was desirous of seeing his father and being present with him in case of his sickness, should he be taken dangerously ill, before his father died. That said message so delivered to said defendant at N. Mo., for transmission and delivery to plaintiff was transmitted by said defendant over its telegraphic lines to L., Kans., at which point it had and maintained a telegraph office and was received by it at its said office at L., Kansas, on the morning of, 19. ., at half-past nine o'clock. That plaintiff at said time resided in L., Kans., and had so resided for over a year and so resided and lived with his family within four blocks of the office of the said defendant where it received said message and that he was well known to the railroad station agent in charge of the office where said message was received and that he was also a subscriber to the phones of the L. telephone Company, the only company having a phone system in said town of L., Kans., and that his name appeared upon the printed directory and card issued and published by said company thereon as a

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subscriber to said telephone system and as having a phone in his house in L. at said time. That said phone card was arranged alphabetically and that under the letter G thereon plaintiff's name and phone number appeared as follows: That said phone card was supplied by said phone company, together with one of its phones, to defendant at said time and that there was then in the office of the said defendant at L. a phone of the said telephone company and one of said directories and cards in connection therewith, showing plaintiff's name, number, and phone address and that he was not only resident within four blocks of said defendant's office but said defendant then had in its office upon said phone card the number and address of plaintiff and had by said phone direct means of communication with him by said phone, which was then in working order. That plaintiff was well known about said town of L. and was known at the grocery stores, meat shops, newspaper offices and post office, and his name appeared upon the registration list of voters of the said city of L., which was a city of the second class, as a registered voter thereof in the ward and also upon the list of residents as just prior thereto returned by the city assessor. That by the exercise of the slightest degree of diligence the said message could have been delivered promptly and speedily to plaintiff. That the said defendant did not deliver said message to plaintiff until two o'clock and twenty-five minutes P. M. of the day of, 19.., and during all said time kept and retained said message from the morning of, 19.., at 9.30 A. M. until 2.25 P. M. of That on, 19.., plaintiff learned from other sources than defendant that there was a telegram for him at defendant's office, when he went to defendant's office and the said message was delivered to him by defendant at 2:25 o'clock in the afternoon, as more fully appears by the said message as delivered, which is hereto attached marked "exhibit B," and made a part thereof.

That the defendant and its agents exercised no diligence whatever in endeavoring to deliver said message to plaintiff. Plaintiff further alleges that upon the receipt of said message

he at once made his arrangements to visit his father at N., Mo., and the first train which left said city of L. for said N. was upon the F. R. at ten o'clock of the day following and that he made his arrangements to take said train and go to said N., to his father, and did so leave on said first train following the delivery of the said message on, to-wit, the day of, 19.., and did go to N. to see his father, arriving there on the day of, 19... That upon his arrival at N. his father was dead and had been buried before the arrival of plaintiff at said place. That plaintiff's father died on , at 6 P. M. That plaintiff's said trip was rendered entirely useless and fruitless so far as seeing his father was concerned and that he paid out for car fare and the purchase of tickets, meals and expenses the sum of dollars upon said trip. That his father was buried on the day of, previous to plaintiff's arrival at N. That had said message to plaintiff been promptly delivered on , 19.., he could have taken said train to N. on said day and at farthest on the following and could have arrived at N. in time to see his father while living and to have attended his funeral. Plaintiff further says that said defendant's failure to deliver said message was wanton and willful, and in utter disregard of plaintiff's rights and defendant was grossly, wantonly and recklessly negligent. That if it had not been for said gross and wanton negligence of defendant and its utter disregard of plaintiff's rights and its wanton refusal and failure to deliver said message, plaintiff would not have been deprived of the pleasure and solace of seeing his father while alive and could and would have performed the filial duty of attending his funeral, and that the said expense by him incurred in making the trip would not have been rendered valueless and uselessly incurred. Plaintiff further says that he repaid to said J. S. the sum of 50 cents by him paid to said company for the benefit and information of plaintiff and upon his account and he alleges that by and on account of all said matters hereinbefore set out he has been and is damaged in the sum of dollars.

Plaintiff further alleges that after the failure of the de-

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defendant to deliver said message and on the day of, 19.., he made out, and within thirty days from the receipt of said message delivered and presented to defendant his claim in writing for said damages.

Plaintiff further alleges that the defendant has neglected to pay plaintiff said damages or any part thereof and the said sum of \$...... is now due plaintiff as damages aforesaid.

Wherefore, plaintiff prays judgment for said sum of \$...... against said defendant as follows for the said sum of paid for and on account of said message. For the sum of \$...... for and on account of said railroad fare and expenses. For the sum of \$...... for exemplary or punitive damages all on account of the willful, gross, wanton, negligent failure of defendant to promptly deliver said message, and prays judgment for costs herein and all relief he is entitled to.⁷

567. ACTION AGAINST TELEGRAPH COMPANY FOR DAMAGES FOR FAILURE TO TRANSMIT AND DELIVER MESSAGE.

That the defendant, the W. U. T. Co., was, at the time of the grievances hereinafter stated, and is now, a corporation, duly organized and incorporated under the laws of the State of, and as such was and is doing business in the State of Kansas, and was and is owning and operating a telegraph line in the State of Kansas, between the city of T., in and through S. county, and the city of D., O. county, in the State of K., and was then and is now engaged as a common carrier for hire, in sending messages for the public, by means of such telegraph between said points.

Plaintiff further states, that on or about the day of, 19..; he was temporarily at the city of D., in the State of Kansas, and that on or about said date the plaintiff, by his agent, J. G. W., made and entered into a contract with defendant, its agents and employees, at the city of T., which in consideration of the sum of cents to it paid by plaintiff, undertook, promised and agreed to transmit and deliver, without unnecessary delay, a certain telegraphic mes-

⁷ From form in record in *Western Union v. Gilstrap*, 77 Kan. 191.

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sage to plaintiff, at the city of D., State of Kansas, where plaintiff was temporarily residing as aforesaid, which message was in words and figures following, to-wit:

"N. T., Kansas, ..., 19... To G. W., D., Kansas, care of post office: Uncle Sam died last night; funeral Wednesday.

"J. G. W."

That plaintiff, by his agent as aforesaid, then and there paid defendant cents, the regular consideration, and price by it charged for transmitting and delivering said message from the city of T. to the city of D., in the State of Kansas, which consideration was then and there accepted by defendant, and for which it agreed, without unnecessary delay as aforesaid, to transmit said message to plaintiff at the city of D. as aforesaid, and deliver the same to plaintiff in person, or in care of the post office, at said city of D.; that although defendant well knew the whereabouts of plaintiff, and the post office, in care of which said message was sent at said city of D., State of Kansas, and could and should have delivered the same to plaintiff as aforesaid on the same day it was sent, yet defendant, its agents and employees, maliciously and in gross neglect of duty failed and refused to deliver the same to plaintiff, or to the post office as aforesaid within a reasonable time, but grossly and maliciously neglected and failed to deliver said message to plaintiff when called for by him in person, and never delivered the same to plaintiff or in care of the said post office as by its conduct it had obligated itself to and was bound to do.

Plaintiff further avers, that at the time of the said grievances he was years of age, and had an only brother, S. C. W., who was years of age, and who resided in P., ..., and that said telegram was to notify plaintiff of the death of his said brother S., which was then and there to the defendant, its agents and employees, well known, and whose funeral the plaintiff desired to and would have attended but for the gross negligence of defendant, its agents and employees, to deliver said message to plaintiff, as by the

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contract it obligated and bound itself to do; that the funeral of the said S. C. W., deceased, was deferred so that plaintiff could attend the same, and which the plaintiff intended to and would have done, if said telegram had been delivered within a reasonable time, in accordance with said contract, but in consequence of the failure and gross and malicious negligence of the defendant, its agents and employees, to deliver said dispatch, as by its said contract it had obligated itself, and was bound to do, the plaintiff was deprived of the satisfaction and pleasure of seeing his said brother, and being present at his funeral, and because of which plaintiff suffered great and irreparable injury, distress and mental pain and anguish, and which was great and overpowering, and was due and caused by the failure and gross and malicious neglect of the defendant, its agents and employees, to comply with, and in breach of, its said contract. And thereby also, because of the failure of defendant to transmit and deliver said telegram to plaintiff, as it was bound to do, the plaintiff was forced to and did then and there lay out and expend large sums of money and performed labor, to-wit, ... dollars in and about making search for, and attempting to find said telegram, caused by the failure and gross and malicious neglect of the defendant, its agents and employees, to comply with, and in breach of, its said contract, and by its negligence.

Wherefore, the said damage sustained, as aforesaid, by reason of the breach of contract and gross negligence of the defendant, through its agents and employees, was and is in the sum of dollars, for which plaintiff demands judgment, costs and other relief.⁸

⁸ Form in *West v. Western Union Telegraph Co.*, 39 Kan. 93, 96.

Exemplary damages may be awarded in an action against a telegraph company for failure to deliver a death message, where it appears there was wanton and reckless disregard of the rights of the plaintiff. *Hollingsworth v. Western Union Tel. Co.*, 82 Kan. 472.

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588. ACTION FOR DAMAGES RESULTING FROM THE DEATH OF THE SON OF PLAINTIFFS, BY BEING CRUSHED IN A MINE SHAFT THROUGH THE NEGLIGENCE OF DEFENDANT'S SERVANT IN NOT PROPERLY MANAGING THE HOISTING MACHINERY.

The plaintiffs for their cause of action allege and aver as follows: That the defendant is a corporation, organized and existing under the laws of the State of Kansas, and as such corporation it was at said times engaged in the business of mining and raising coal up through a shaft from the vein of coal within the ground to the surface.

That the business of mining coal was carried on by means of servants, employees, and machinery of various kinds; that such machinery consisted in part of a tippie, or small wooden house erected over said shaft, supported by heavy timbers connected with such shaft (here follows minute description of the machinery and working of the mine).

That there was employed by said defendant corporation at the time of the injury hereinafter complained of, a "mining boss" or "pit boss," whose duty, among other things, was to employ and discharge the miners, pushers, engineer and other employees in and about said coal shaft and mines; to assign to each man so employed his work to be by him performed, and to direct and order said employees to do and perform labor in and about said mines as the said boss might desire; and which boss was empowered by defendant corporation to direct, control and manage the actions of all employees in their work in and about said shaft and mines.

That the defendant corporation employed J. B. to work in its said coal mine on or about the day of, 19.., and he worked from that time until and including a part of the day of, 19.., during which time he labored at different kinds of work, under the direction of the defendant and its mine boss; the principal part of his work during said time was pushing the mine cars loaded with coal to the bottom of said shaft, and loading said cars of coal upon either of said cages where said cars of coal were hoisted as aforesaid, up through said shaft; and to push empty cars, which had been lowered to the bottom, from the bottom of the

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shaft, out through the entries in said mines for reloading. That on , 19.., the said J. B. pushed a loaded car of coal upon one of its said cages at the bottom of the shaft, and gave the signal to the engineer, which signal was heard by said engineer in said engine house, to hoist the said car of coal, which he, the said J. B., had so placed on said cage, by jerking said wire and ringing said bell or metals once. That it was the duty of defendant and its said engineer upon receiving said signal to immediately and without waiting to hoist such car of coal, which duty defendant by its engineer failed, neglected and refused to perform; and instead of performing its duty as aforesaid, the said engineer, attending to firing the boilers, starting his pumps, and had a conversation with the said mine boss relative to hoisting the car pushers out of the mines for the purpose of replacing under the dump a run-away railroad car; said engineer then left his said engine house, going some distance therefrom, during which time a number of minutes elapsed before said engineer returned to said engine house, the exact time being unknown to plaintiffs; that immediately after the conversation of said engineer with the mine boss, the boss went to the top or mouth of said shaft and called down said shaft to the said J. B. and two other pushers to "take the car of coal off of the cage and you three pushers come up on the cage, and give us a lift at getting a partially loaded railroad car back under the dump"; that immediately upon said order having been given by the defendant through its mine boss, J. B. and another car pusher undertook to obey said orders and command defendant through its mine boss by then and there attempting to pull said car of coal from and off of said cage onto the track in said mine; that they pulled said car but a few inches when said car stuck and could not be moved further by pulling the same; when J. B. took a coal prop in his hands and climbed over said car of coal to the opposite side of said car from which he had been pulling; and the said J. B. then and there used said prop as a pry and lever in attempting to remove said car from said cage, in compliance with said command; and when they had succeeded in getting said car about

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half way off of said cage, the defendant by its engineer and without any signal having been given to him to hoist said cage, and without any right to hoist the same at that time, recklessly, wantonly, willfully and negligently did hoist and cause to be hoisted said cage, upon which cage there was the said loaded car of coal, and the said J. B. That the sudden and negligent hoisting of said cage, dumped the bottom of said cage and threw said car of coal into the dump below; and the said J. B. was thrown against the side of the shaft, and was caught between the said cage and the cross timbers near the bottom of the shaft, and thereby was crushed and mangled to such an extent that within a very few minutes thereafter he died; the exact time between the injury being received and his death being unknown to the plaintiffs. That by reason of said wanton, willful and negligent acts of said engineer who was in the employment of said defendant, and who was in charge of the engine and performing the duties of engineer at said shaft and mines on said , 19.., and at the time of, and prior to the injury hereinbefore set out, the said engineer contributed to the injury and death of the said J. B. Plaintiffs further say that the mine boss knew and was familiar with the workings of said mines and shaft, to such an extent that he knew it was the duty of each pusher when he placed a car of coal upon the cage, to immediately give the signal (one ring of the bell or metals) to hoist such loaded cage; that immediately prior to said injury the said mine boss knew that there was a loaded car upon said cage, and knew that it was the duty of said engineer to immediately hoist the cage, on said signal being given; he, the said mine boss, without ascertaining whether said signal had been given, and if given, what length of time had elapsed since being given, and without having attempted to arrange with the engineer for the removing of said car of coal from said cage, and the hoisting of said pushers from said mines, grossly, wantonly, willfully and negligently called to said J. B. and other pushers to remove said loaded car from said cage, and come out of said shaft, as hereinbefore alleged; that by reason of said gross, wanton and willful negligence on the part of said

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defendant through its said mine boss, in ordering and commanding said pushers as aforesaid, to do and perform the things hereinbefore alleged, and because of the said wanton, willful and negligent acts of said defendant through its said engineer as hereinbefore alleged, the said J. B. sustained said injury which resulted in his death, as aforesaid, and without any fault or negligence on the part of J. B., and in obedience to the orders and commands of said defendant corporation. (For capacity of plaintiff to maintain suit see Form No. 315.) *

589. ALLEGATIONS OF NEGLIGENCE IN ACTION FOR DAMAGES BY AN EMPLOYEE AT AN ELEVATOR, WHO WAS INJURED BY SWITCHING OF CARS UPON SIDE TRACK WHERE HE WAS WORKING.

That on or about the day of, 19.., and for a long time prior thereto, plaintiff had been working in said west elevator at a salary of dollars a month, and on said day there were standing on said side track at said elevator three cars, one of which plaintiff was loading with grain, the other two standing west of said loaded car and being empty; that while said plaintiff was loading said car one of defendant's engines, pulling several freight cars, proceeded west of said depot on defendant's main line and backed on to said switch going to the east elevator for some purpose unknown to plaintiff; that in so going the said three cars as above mentioned were pushed toward said east elevator; that after the purpose had been accomplished for which defendant's engine and cars had been pushed to said east elevator the said engine proceeded west, pulling the two empty cars and the car almost loaded as aforesaid back to the west elevator, trying to leave the loaded car in the position it occupied before being moved east; that after said three cars were so brought to said west elevator one of defendant's brakemen uncoupled the said three cars from the balance of the freight train when said freight train proceeded west; that plaintiff discovered that said loaded car as aforesaid was not occupying

* From form in record in Improvement Co. v. Buzzard, 69 Kan. 330.

a position where the loading of the same could be finished, went to the top of the loaded car, the brake having been put on by one of the defendant's brakemen, and threw off the brake, expecting that by so doing the car would move a little to the east, the grade inclining toward the east; that while plaintiff was still on top of said car he saw that said engine and the cars attached thereto were proceeding west to the main track and plaintiff, being satisfied that the switching by said engine for said time was through, descended to the ground and finding that said loaded car did not move far enough east, took a crowbar and commenced to apply the same to one of the wheels of said loaded car, thereby trying to move the same; that while plaintiff was so engaged defendant's brakeman, whose name is unknown to plaintiff, in connection with said freight train, discovering that a loaded car in connection therewith should also have been cut off and left on said side track, accordingly notified the engineer of said train of said fact and while plaintiff was engaged in trying to move said loaded car with said crowbar and without any notice whatever of said change of plans being conveyed to him, without any of defendant's brakemen or agents in any way giving notice to said plaintiff, the said engineer with gross negligence and extreme carelessness and without giving any signal either by whistle, bell or in any other way, caused said engine to "kick" said loaded car back on to said switch without said car having any person or persons controlling its movements, and it was sent with such force that as it struck said two empty cars they struck plaintiff on his back, whereby said crowbar he was using in front of him was driven completely through the following muscles of plaintiff's left thigh, to-wit: (set out injuries).¹⁰

590. ALLEGATIONS OF NEGLIGENCE IN ACTION FOR DAMAGES FOR INJURIES CAUSED BY THE DEFENDANT CARELESSLY PUSHING ANOTHER CAR AGAINST THE ONE IN WHICH PLAINTIFF WAS AT WORK.

Plaintiff alleges and says that said defendant, by its agents, servants and employees, without any notice or warning of

¹⁰ Form in Chicago, B. & Q. R. Co. v. Giffen, 70 Neb. 66.

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any kind to this plaintiff, carelessly, negligently and heedlessly switched the same partly unloaded car, which said defendant had before taken from the side track, back, down and upon the same side track upon which the car, in which the plaintiff was working, and said defendant by its said engine, operated by the agents, servants and employees of said defendant, without any notice of warning to this plaintiff, carelessly, negligently and heedlessly switched, pushed and propelled, with great force, speed and violence, said partly loaded car upon and against the said car in which the said plaintiff was then working, and struck said car with great force and violence, thereby knocking the said plaintiff from his feet and throwing said plaintiff, by reason of the great force of the moving car, upon his back.¹¹

591. ACTION FOR DAMAGES CAUSED BY FIRE BEING COMMUNICATED TO PLAINTIFF'S PROPERTY, WHICH WAS STARTED BY THE DEFENDANT SETTING FIRE TO A PRAIRIE.

Now comes the plaintiff, M. A., and for his cause of action against the defendant, A. J., complains and alleges:

1. That the plaintiff was on the day of, 19.., and ever since has been, and now is the owner of the following-described real estate, situate in C. county, Kansas, to-wit: (here describe) on which there were, until the acts hereinafter complained of, a stable and granary, of the value of dollars; rods of hedge, of the value of dollars per rod; rods of hedge of the value of cents per rod; cherry trees of the value of dollars each; raspberry and blackberry bushes of the value of dollars; and also bushels of wheat, of the value of dollars per bushel; bushels of oats, of the value of cents per bushel; and tons of hay, of the value of dollars per ton; belonging to said plaintiff and of the aggregate value of dollars.

2. That the defendant, A. J., willfully and intentionally, on or about the day of, 19.., set the prairie grass on fire on the land lying south of the land of this plain-

¹¹ Form in Linker v. Union Pac. Ry. Co., 82 Kan. 580.

tiff above described, and so negligently and carelessly watched and tended the said fire that it came onto the plaintiff's said land and consumed and destroyed said stable, granary, hedge, cherry trees, blackberry and raspberry bushes, wheat, oats and hay, to the damage of the plaintiff in the sum of dollars.

Wherefore, the plaintiff prays for judgment against the defendant for the said sum of dollars, and for costs of suit.¹²

592. ALLEGATIONS OF NEGLIGENCE IN ACTION FOR DAMAGES BY WIDOW AS ADMINISTRATRIX OF HER HUSBAND'S ESTATE WHO WAS KILLED WHILE PERFORMING HIS DUTY AS A BRAKEMAN.

That said train last mentioned was carelessly and negligently run too near said other train on the same track as aforesaid and was carelessly and negligently brought to a sudden stop by the engineer while running at an unnecessary and improperly high rate of speed, and when the air-brakes were applied by the engineer in a reckless, careless and negligent manner, without warning to said intestate, the engine was kept at the rate of speed attained just prior to said application of the air-brakes, and by reason of such carelessness and negligence and the consequent unnecessary sudden stopping of said train while the engine was going ahead at such a high rate of speed the train was broken in two just in front of the front car of said train, and the said A. C. then being at his post of duty on the top of the front freight car, was thrown violently to the ground in front of said car and killed.¹³

593. ALLEGATIONS OF NEGLIGENCE IN AN ACTION BY PARENTS AGAINST STREET RY. CO. FOR DAMAGES FOR KILLING OF MINOR SON.

Plaintiffs aver that on the day of, 19.., the minor son of plaintiffs, as aforesaid, was lawfully crossing over street, in the city of, Kan., at a point on

¹² Form in Jarrett v. Apple, 31 Kan. 693.

¹³ Form in Atchison, Topeka and Santa Fe Ry. Co. v. Carter, 60 Kan. 65.

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said street where street, one of the streets of said city, intersects with said street, when one of the defendant's street-railway cars, to-wit, No., that was being carelessly, negligently, recklessly and wantonly run and operated along and over said street by defendant, struck and knocked the said E. F. down, and defendant carelessly, negligently, recklessly and wantonly ran said car upon and over the body of plaintiffs' minor son, as aforesaid, instantly killing the said minor son of plaintiffs.¹⁴

594. ACTION FOR DAMAGES FOR INJURIES RECEIVED BY COMING IN CONTACT WITH A GUY WIRE OF A POLE CARRYING HEAVILY CHARGED ELECTRIC WIRES.

Comes now the plaintiff and for cause of action against the defendant company herein named, alleges and states:

1. That plaintiff is an infant of the age of ten years and brings this action by T. M. S., her next friend.

2. That on the day of, 19.., and for a considerable time prior thereto, plaintiff resided on the north side of street, at what is known as No. E. T. street, in the city of S., in the county and state aforesaid; that the home of the plaintiff at the time aforesaid was about one hundred feet west of the southeast corner of lot, in block, in C. addition to the city of S.; that O. avenue and P. avenue are public streets, extending north and south through said city of S., and T. street is likewise a public street extending east and west through said city of S.; that said O. avenue and said T. street intersect at the southeast corner of said lot, in block, in said C. addition to said city of S.

3. That defendant company was at all times hereinafter mentioned and is now, a duly organized and existing corporation, under and by virtue of the laws of the State of, with authority to erect and maintain poles and to string and maintain electric light wires in said city of S., and was at all times hereinafter mentioned and is now the owner of and operating an electric light plant in said city of

¹⁴ Form in Southwest Missouri E. Ry. Co. v. Fry, 71 Kan. 736.

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S. for the purpose of furnishing light, heat and power to said city of S. and to the inhabitants thereof, and was so operating said electric light plant and machinery for such purposes on the day of, 19.., and on the day of, 19...

4. That for the purpose of distributing the electric currents for the purposes aforesaid, the said defendant company had certain electric light wires suspended upon certain poles; said electric light wires extending through and along the streets and alleys of said city and in particular at the times aforesaid on and along O. avenue in said city of S.

That about six feet south and about six feet east of the southeast corner of said lot, in said block, in said C. addition to said city of S., at the intersection of said O. avenue and said T. street, the defendant company erected and at all times hereinafter mentioned maintained a pole which is about thirty feet high, near the top of which pole there was on, 19.., and on, 19.., a certain wire which was fastened near the top of another pole belonging to the defendant company, that was situated and maintained by defendant company, at or about the corner, diagonally across said O. avenue; that attached to the wire aforesaid, at a point about the center of said O. avenue and T. street, was a main electric light wire and an electric lamp hanging thereto which belonged to and was maintained as aforesaid by defendant company; that the main electric light wire aforesaid at the times aforesaid carried a heavy, dangerous and deadly current of electricity; that all of the wires, lamp and the poles aforesaid, were a part of the plant of said defendant company; that a guy wire belonging to defendant company was maintained by defendant company and said wire extended from or near the top of the pole described first aforesaid to a point about three feet from the ground where said guy wire was fastened to an iron rod attachment which was about one inch thick; that the iron rod attachment aforesaid then run into the ground about feet south and about feet west of the said southeast corner of said lot, in said block, in said C. addition to said city

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of S.; that said iron rod attachment was fastened to an anchor which was sunk below the surface of the ground by defendant company; that the guy wire, iron rod attachment, and anchor aforesaid were a part of the plant of defendant company; that the guy wire and the iron rod attachment aforesaid were so placed, situated and maintained by defendant company at the place aforesaid, as aforesaid, that persons passing along the walk on the north side of said T. street between O. avenue and P. avenue, and south of the lot described aforesaid, were liable to come in contact with them; that the wires, lamp and guy wire and iron rod attachment mentioned aforesaid were not in a reasonably safe condition and were not protected or insulated in any particular whatever at the times aforesaid; that due care on the part of the defendant company required that the wires, lamp and attachments thereto as aforesaid be properly insulated and that the guy wire and iron rod attachment aforesaid have placed and properly fastened to them prior to being placed in the position as aforesaid and at all times maintained at least two glass "insulators" or "circuit breakers" so as to prevent electricity from passing along or upon the guy wire and iron attachment aforesaid.

6. That on the day of, 19.., and on the day of, 19.., the defendant company negligently and carelessly permitted the wires, lamp, guy wire and iron attachment aforesaid to become out of repair by coming in contact with each other, or with some other substance not known to plaintiff; that the defendant company carelessly and negligently failed to provide and maintain proper means to keep the electricity from its main wires at the place aforesaid from coming in contact with the other wires and guy wire and iron rod attachment aforesaid; that by reason of the gross carelessness and negligence of defendant company the pole described first aforesaid was burned by the wires of the defendant company, near the top of the said pole, causing the lamp aforesaid in some manner unknown to plaintiff to come in contact with the guy wire; that by reason thereof the guy wire and iron rod attachment aforesaid became charged

with a heavy, deadly and dangerous current of electricity from the wires of the defendant company; that defendant company through gross carelessness and negligence permitted the wires, guy wire and iron rod attachment aforesaid to remain out of repair and in said broken and defective condition for several hours on the day of, 19.., and on the day of, 19.., all of which time the wires, guy wire and iron rod attachment aforesaid were charged with a strong, deadly and dangerous current of electricity; that defendant company had notice for several hours before the time of the injury to plaintiff hereinafter described and on, 19.., and on, 19.., that its main wires were defective and out of repair and that the electricity it was transmitting over its main wires was leaving said main wires and was going into the ground, over and upon its guy wires or other means.

7. That on the day of, 19.., at about the hour of 7.30 A. M., this plaintiff was passing eastward along and upon the walk on the north side of said T. street and in close proximity to the guy wire and iron rod attachment aforesaid, which was about 2½ inches from the outside edge of said walk; that while in the exercise of due care and caution and without any fault or negligence on her part and without having any reason to suspect the dangerous condition of said guy wire and iron rod attachment aforesaid, plaintiff inadvertently came in contact with said guy wire and iron rod attachment aforesaid; that at the time last aforesaid by reason of the defective wires aforesaid, the guy wire and iron rod attachment aforesaid, was charged with a heavy, dangerous and deadly current of electricity; that at the time last aforesaid plaintiff received an electric shock from said guy wire and iron rod attachment aforesaid which rendered her unconscious and caused her to fall upon and against the said guy wire and iron rod attachment aforesaid; that at the time last aforesaid various strong, dangerous and deadly currents of electricity entered the person of plaintiff and caused the following described permanent injuries to plaintiff, to-wit: (describe injuries).

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8. That the injuries to plaintiff as aforesaid were caused by the negligence and gross carelessness of the agents, servants and employees of the defendant company, in maintaining and keeping the wires, guy wire and iron rod attachment aforesaid, without proper insulation glass insulators, or circuit breakers.

9. That immediately after receiving the injuries aforesaid, plaintiff was taken to the hospital for care and attention and for a long time was confined in said hospital; that by reason of the injuries aforesaid it became necessary about the time aforesaid to perform a surgical operation upon the tibia or large bone of plaintiff's leg; that by reason of the injury to the tibia or large bone of plaintiff's leg, it will be necessary to amputate said leg as soon as the general health of plaintiff will permit; that before the time of the injury aforesaid plaintiff was a healthy, robust child; that the injuries aforesaid have affected the general health of plaintiff; that plaintiff has suffered and still suffers great and excruciating bodily pain and has undergone great mental suffering, agony and worry; that plaintiff has been rendered a permanent cripple and disfigured for life to her damage in the sum of dollars by reason of the injuries aforesaid.

Wherefore plaintiff prays judgment against said defendant company for the sum of dollars by reason of the injuries aforesaid and for cost of suit.¹⁵

**595. ACTION FOR DAMAGES BY REASON OF BEING BITTEN BY
A WOLF NEGLIGENTLY ALLOWED TO RUN AT LARGE
BY THE KEEPER.**

The above named plaintiff, M. S., who sues in this action by his next friend, J. S., and states to the court: That this action is begun for the sole benefit of the above named plaintiff, M. S.; that the defendants, M. Bros., are partners doing business in the city of L., ... county, Nebraska; that the defendants, A. M., W. M. and P. M., whose first full name is unknown, are the members and the only members of said partnership of M. Bros.; that on the day of, 19..,

¹⁵ From form in record in Shawnee Light & Power Company v. Sears, 21 Okla. 13.

and for a long time prior thereto, the said defendants were the owners of and in charge of, and were wrongfully, willfully, and injuriously keeping and harboring a vicious, wild animal, to-wit: A wild wolf in the city of L., ... county, Nebraska; and that on the said day of, 19.., in the city of L. aforesaid, the said defendants did so wrongfully and injuriously and negligently keep said wild and vicious wolf, knowing the nature of said wild and vicious animal; that the said wolf was running at large on the streets in the city of L. aforesaid; that on the said day of, 19.., while this plaintiff was walking on the streets of the city of L. aforesaid, the said wolf did, while so running at large as aforesaid, attack this plaintiff with his teeth and claws, and did there and then bite, claw, wound, and lacerate this plaintiff on or about the legs and arms, and did greatly injure this plaintiff on or about the body as aforesaid, because of which this plaintiff became sick, sore, and lame, and so remained and continued for a long period of time, to-wit, for the space of six weeks, during which time he, the said plaintiff, suffered great bodily pain and suffering and anguish of mind and mental suffering, and that during all of the time from said injury up to the beginning of this suit, this plaintiff, because of such injury and laceration as aforesaid, has and still is suffering great anguish of mind and mental pain; that this plaintiff has sustained damages by reason of the aforesaid biting, wounding, and lacerating and the bodily pain and suffering and the mental anguish caused thereby, in the sum of dollars, no part of which has been paid.¹⁶

596. ALLEGATIONS OF NEGLIGENCE IN AN ACTION TO RECOVER FOR PERSONAL INJURIES SUSTAINED BY BEING THROWN FROM A WAGON AS HE WAS DRIVING INTO THE GROUNDS OF THE DEFENDANT.

It negligently and carelessly constructed and maintained a certain road or driveway, at a point near the said main entrance, and upon the land of said defendant; that said last-mentioned road or driveway was carelessly and negligently

¹⁶ Form in *Manger v. Shipman*, 30 Neb. 352.

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constructed and maintained by the said defendant company in this, to-wit, that said last-mentioned road or driveway was elevated above the general surface of said land by the placing of loose and incompact dirt and materials, to-wit, pieces of boards, boxes, chips, shavings, sweepings and refuse from the plant and yard of said defendant company, the same being covered by cinders loosely placed or dumped thereon, all of said material in said road or driveway being unpacked or rolled and in such a condition that the same was unsafe and dangerous for the passage of loaded wagons thereon, and the wheels of said loaded wagons or teams would easily sink or cut into the material composing said road or driveway, and that the same was so as aforesaid negligently and carelessly permitted by said defendant so to remain. Thereby bruising, maiming and injuring plaintiff and causing him to become sick and sore, and fracturing his left leg midway between his ankle and knee, thereby causing plaintiff great bodily pain and mental anguish, which he will continue to suffer during the remainder of his life, and permanently injuring him.¹⁷

597. ALLEGATIONS OF NEGLIGENCE IN AN ACTION FOR DAMAGES FOR WRONGFUL DEATH OF AN EMPLOYEE IN A COAL MINE.

Plaintiff states that the defendant knowingly and willfully permitted inflammable gases to accumulate therein, and permitted large quantities of cold dust, impregnated with sulphur, to accumulate in the passages thereof, and permitted the same to become dry and inflammable and explosive, and so allowed the same to so remain for a long space of time; that by means and reason of the said negligence, carelessness and default of the defendant, an explosion took place in said mine, at about the hour of o'clock P. M. on the day of, 19.., that said explosion was caused by the negligence of said defendant in negligently permitting the accumulation of combustible and inflammable dust in said mine, which, being communicated with by a blast of powder in the mine, caused a general explosion in the mine; and, among other cas-

¹⁷ Form in Cudahy Packing Co. v. Broadbent, 70 Kan 535, 536.

ualties, caused the death of the plaintiff's intestate, as herein-after stated; by means and reason whereof the said J. W. W. was wounded, mangled, bruised, and killed, all without any fault or negligence on the part of the said J. W. W., and while he was working in said mine under and by virtue of his said employment; that had it not been for the accumulation of said inflammable and combustible matter in said mine said explosion could not and would not have happened. Said defendant knew, or should have known, in the exercise of ordinary prudence, that the presence and accumulation of said dust was a dangerous element in said mine, but negligently failed to provide reasonable precautions against danger, by sprinkling said mine or otherwise, or to provide against danger and death by the exercise of any ordinary prudence against permanent injury or death to employees and plaintiff's intestate.¹⁸

**598. ALLEGATIONS OF NEGLIGENCE IN ACTION AGAINST
STEAM RAILWAY COMPANY FOR DAMAGES FOR AN
INJURY CAUSED BY BEING STRUCK BY MOVING TRAIN.**

Plaintiff states:

1. That said train of cars was traveling faster than miles per hour, in violation of ordinance of the city of K. C., K.
2. That there were not enough men in proper places on said train to communicate stop signals with reasonable promptness to the engineer who was in charge of the locomotive of said train.
3. That, under the circumstances of this case and the rate of speed at which said train of cars was traveling, the brakes on the cars of said train should have been connected with the locomotive.
4. That the trainmen who were operating said train did not observe that the switch connecting the side track with the main track was not in a safe and proper condition for the passing of trains over it, when they reached said switch with said train, and not immediately stopping said train.

¹⁸ Form in *Cherokee & Pittsburg Coal and Mining Co. v. Wilson*, 47 Kan. 460.

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5. That the main-line switch was not kept securely locked and fastened.¹⁰

599. ALLEGATIONS OF NEGLIGENCE IN ACTION FOR DAMAGES FOR INJURIES SUSTAINED BY REASON OF TEAM BECOMING FRIGHTENED WHEN APPROACHING A RAILWAY CROSSING.

Plaintiff states that on the day of, 19.., the defendant was operating a certain line of railroad through the county of W. and State of Kansas, known as V. V. I. & W. railroad, which said railroad so operated by defendant runs across a certain highway, which said highway was duly and legally laid out and traveled prior to the construction of said railroad; that where said railroad crossed said public highway, and prior to the construction of said railroad, the ground was smooth and level; that in constructing said railroad, an embankment some six feet high was thrown up by the defendant company, upon which it constructed its said road; that the defendant negligently and carelessly constructed approaches to said crossing which were narrow, steep and unsafe, and has failed to restore said public highway to its former condition, or to such condition as did not materially impair its usefulness; that the approach to the railroad by the public highway was obstructed by a high hedge along the north side of the highway, so it was impossible for a person using the highway to observe a train or other object through the hedge; that where the railroad passes through the hedge fence, an opening was cut for a distance of feet in width, and aside from this opening this hedge fence grew upon the north side of the highway a distance of half a mile, and a distance of a quarter of a mile on each side of the railroad track, which rendered said crossing very dangerous unless a great deal of care was exercised upon the part of the railway company in operating the road; that on the day of, 19.., the plaintiff was traveling upon said highway in a wagon drawn by two mules, going in an eastern direc-

¹⁰ Form in Kansas City Suburban Belt Ry. v. Herman, 64 Kan. 546.

tion; that said railroad, by reason of said hedge fence, was entirely obstructed from the view of the plaintiff north of the crossing; that the plaintiff, knowing the dangerous condition of said crossing, approached the same with great care, intending to stop, look and listen for an approaching train; but upon approaching said crossing, and before she could get a view of said track, said defendant, its agents and servants, ran one of its trains of cars, drawn by a locomotive engine, down said track, in a southeasterly direction, and over said crossing, which said train of cars passed directly in front of the mules driven by plaintiff's husband, and caused them to jump from the narrow approach to said crossing down an embankment, a distance of feet, carrying with them the wagon in which plaintiff was then sitting. By reason of the premises the plaintiff was thrown out of said wagon, down said embankment, striking a post upon the side of the highway, then dragged by said team a distance of about feet, and was mangled, bruised, and injured. Plaintiff avers that defendant neglected and failed to sound the whistle of said locomotive engine rods before approaching said crossing; by reason thereof she was not warned of said approaching train until the same passed over the crossing immediately in front of the mules driven by her husband; that had defendant's agents and servants sounded said whistle, as it was their duty to do, ... rods before approaching said crossing, she would have heard the same, and averted the accident.²⁰

600. ALLEGATION OF NEGLIGENCE IN ACTION FOR DEATH OF INFANT RUN OVER BY STREET CAR DRAWN BY MULES.

That on or about the day of, 19.., G. C., an infant son of said plaintiffs, under the age of two years, and unmarried, while upon N. F. street, a public thoroughfare in the city of, was run over and killed by the defendant's street car, hauled by a team of mules attached

²⁰ Form in *Missouri Pacific Ry. Co. v. Johnson*, 44 Kan. 660.

Allegations in action alleging negligence in failing to give warning of approaching train. *St. Louis & S. F. R. Co. v. Houston*, 27 Okla. 719.

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thereto, on said F. street, by reason of the carelessness and negligence and disregard of duty on the part of the servant of said defendant, in managing and operating said car, and in failing to keep a proper lookout for persons approaching and on defendant's street car track.

Plaintiffs further aver that at the time said G. C. was run over and killed, the defendant had a driver on the front platform of said car, driving said team attached thereto, and that the driver saw, or in the exercise of reasonable care and diligence in keeping a lookout for persons on foot, either on the track or moving towards it, could and would have seen the plaintiff's son in time to have stopped said car so as to have prevented said injuries; nevertheless, said driver carelessly and negligently failed to observe said infant, in said perilous position, or else carelessly and negligently failed to stop said car after observing him, and before said accident, as it was the duty of the driver to do, and as he might, by the exercise of reasonable care and diligence, have done; and that such carelessness and negligence on the part of said driver directly contributed to said death.

And the plaintiffs further aver that, at the time of said injuries and death, the agent and servant of the defendant in charge of said car, saw or by the exercise of reasonable care and diligence would have seen, said infant in time to have stopped said car and prevented said death; yet, he failed and neglected so to do, which failure and negligence on his part directly contributed to cause said death.

001. ALLEGATIONS OF NEGLIGENCE IN AN ACTION FOR DAMAGES AGAINST A RAILWAY COMPANY FOR INJURIES RECEIVED BY BEING CAUGHT WHILE PASSING BETWEEN THE CARS WHERE AN OPENING HAD BEEN MADE TO ALLOW PERSONS TO CROSS THE TRACK.

Plaintiff further alleges that on the day of, 19.., the said railroad company, through its agents and employees, had a freight train which stopped at said station on a side track for the purpose of allowing another train to pass. That the defendant railway company at that time, negligently, wrongfully and unlawfully obstructed the usual

public travel on street across said line at said station for about or minutes with its freight train of cars. That persons going to and from said station on street objected to the unlawful closing of street, upon which objection, the defendant railway company disconnected and separated two of the cars of said freight train about feet apart at or near sidewalk of said street leading to said station, for the purpose of allowing the foot travelers to cross the railway track of the defendant. Between the opening of said train, the travel, on invitation of defendant, was resumed at or near said sidewalk between the cars. That during the time said two cars of said train were disconnected and separated and the travel was resumed on said side track through the opening thus made, this minor plaintiff, a child of immature years, on said date and without fault on his part, started from the south side of said train on said line of travel to go home through said opening in said freight train, and while attempting to do so, the defendant railway company by its agents and employees, without warning, negligently, and wrongfully and without stationing a guard at said opening to warn the public passing through the opening of said train of cars when the opening in the cars would be closed, negligently, wickedly and violently, by means of the engine attached to said train, closed the opening in said train of cars, catching the plaintiff between the drawheads of said detached portion of the train, severing the second finger of the right hand and violently throwing plaintiff to the ground.²¹

602. ALLEGATION OF NEGLIGENCE IN ACTION BY MINOR FOR PERSONAL INJURIES RECEIVED WHILE ATTEMPTING TO PASS BETWEEN CARS OF A TRAIN OCCUPYING A STREET CROSSING.

Plaintiff further states that, on the day of, 19. ., and in the daytime, he was going east on a public street in said city known as L. street, where said street is crossed

²¹ Form in Chicago, B. & Q. R. Co. v. Russell, 72 Neb. 114.

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by defendant's railroad in said city; that at said time and place a train of flat cars was standing across said street, which impeded his progress on said street, which train stood there for several minutes and not in motion; the plaintiff, seeing said train standing perfectly still for several minutes, and there being no sign or indication that it was going to move, and seeing many adults and others crossing over the same in said street—between the flat cars—without let or hindrance, or notice not to do so, he undertook to cross over between two such flat cars, in said street, where the other persons upon said street had crossed immediately before him; that he stopped, listened, and looked, before so crossing, and the bell of the locomotive was not rung, the whistle was not sounded, nor was any audible or visible signal given by defendants or its employees to notify plaintiff that said train was about to be thrust backwards, nor was any brakeman in sight of plaintiff, nor was any brakeman on the rear of said train, nor was there any gate or bar across said street where it was crossed by said railroad, and without any notice of warning whatever given on the part of the defendant, the said defendant, violently, suddenly, carelessly and negligently caused the engine, propelled by steam power, to jam the cars of said train together, thereby breaking and crushing the bones of plaintiff's foot and ankle between the bumpers of two of said cars while he was in the act of crossing as aforesaid, and in consequence, etc.

Plaintiff further states, that considering his age and intelligence, he was at the time exercising that degree of care and diligence which could be expected of him, or that was due from one of his age, and that the immediate cause of said injury to him was the carelessness and negligence of the defendant in failing to do its duty in protecting persons, and especially children of immature judgment, in the lawful use of said public street from injury by its said cars; that the car so thrust backwards which crushed plaintiff's foot, was attached to several other cars and a locomotive, constituting a freight train, which at the time of said injuries, was propelled backwards suddenly and violently by steam power.

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603. ALLEGATION OF NEGLIGENCE IN CASE OF COLLISION OF HORSE AND BUGGY WITH PEDESTRIAN.

Plaintiff further states that on or about the day of, 19.., while plaintiff's said wife, P. D., was walking in a southerly direction across said M. street on, or near, the crossing on the west line of said B., one of defendant's agents, servants and employees in charge of and driving its horse and buggy carelessly, negligently and unlawfully drove said horse and buggy against and upon said P. D., with such force as to throw her violently to the ground (describe injury).

Plaintiff further states that P. D. was at all of said times in the exercise of ordinary care, and that her death was caused by defendant's said servant's negligent, careless and unlawful acts in driving said horse and buggy against and upon her and causing the said injuries as aforesaid.

604. SPECIFIC ALLEGATIONS OF NEGLIGENCE WHERE AUTOMOBILE COLLIDED WITH BUGGY KILLING OCCUPANT.
(ACTION BY WIDOW.)

Plaintiff states that she was the wife of one A. L. at the time of his injury on, 19.., and of his death on, 19...

That defendant on or about the day of, 19.., in the nighttime and about o'clock P.M. was engaged in operating an automobile, propelled by gasoline and steam upon the public streets of the city of, and more particularly was engaged in operating said automobile on K., a public street of the city of, at a point near the intersection of F. D., another public street in said city.

That defendant on said day of, 19.., at about said hour was riding south in said automobile on K. near its said intersection with F. P. B., and that said automobile was then being managed and controlled by a chauffeur riding therein, said chauffeur having been employed by defendant for that purpose and being his agent and servant, and was thus acting within the scope of his duties under said em-

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ployment at the time of the acts of negligence hereinafter complained of.

That at about said hour, on said day of, 19.., A. L., the late husband of the plaintiff, was driving a horse and buggy north at the rate of about miles per hour on said K., near the intersection of said F. P. B. in the said city of, ...; while said A. L. was thus driving north in said buggy, and defendant was riding south in said automobile, the buggy and automobile collided, tearing the buggy to pieces, and causing said A. L. to be thrown violently into the street (describe injury).

That the agent and servant of defendant, the chauffeur in charge of said automobile, while approaching the intersection of F. P. B. with K., carelessly and negligently failed to keep a vigilant watch for vehicles, carriages and wagons drawn by animals and when approaching the buggy drawn by said horse in which said A. L. was riding, carelessly and negligently failed to stop said automobile for such a time as to enable said A. L., riding in said buggy, to pass said automobile, which said negligence, in failing to keep said vigilant watch and stop said automobile, directly contributed to cause the said injuries to said A. L., resulting in his death.

That for other and further assignment of negligence, the agent and servant of defendant, the chauffeur in charge of said automobile at the time of said collision, was carelessly and negligently running said automobile at a greater rate of speed than miles per hour, which said negligence directly contributed to cause the said injuries to said A. L., resulting in his death.

That for other and further assignment of negligence, the agent and servant of defendant, the chauffeur in charge of said automobile at the time of said collision, was carelessly and negligently running said automobile at a high, excessive and reckless rate of speed, to-wit, at about miles per hour, which said negligence directly contributed to cause the said injuries to said A. L. resulting in his death.

That for other and further assignment of negligence, the agent and servant of defendant, the chauffeur in charge of

said automobile at the time of said collision, was carelessly and negligently running and operating said automobile in the night without having two lighted lamps on the front part of said automobile, which said negligence directly contributed to cause the said injuries, resulting in the death of said A. L.

That for other and further assignment of negligence, the agent and servant of defendant, the chauffeur in charge of said automobile, saw, or by the exercise of ordinary care would have seen said A. L. in a position of peril, and could, by the exercise of ordinary care, have stopped said automobile, or sufficiently slackened the speed thereof in time to avoid injuring said A. L.; but that said chauffeur carelessly and negligently failed to use ordinary care to discover said A. L. in a position of peril, and after he saw said A. L. in said position or by the exercise of ordinary care would have so seen him, he (the said chauffeur) negligently failed to use ordinary care to stop said automobile or sufficiently slacken its speed; and that the negligence of defendant in failing, through his said chauffeur, to so discover said A. L., and to stop said automobile and to sufficiently slacken its speed, directly contributed to cause the said injuries to said A. L., resulting in his death.

That for other and further assignment of negligence, the agent and servant of defendant, the chauffeur in charge of said automobile, carelessly and negligently failed to sound the horn or bell on his said automobile, or to give any signal or sufficient warning, while his automobile was approaching the point of said collision, although said chauffeur knew, or by the exercise of ordinary care, might have so known that the plaintiff was approaching from the south in said buggy, and knew, or by the exercise of ordinary care might have so known, the danger to said A. L. from said automobile approaching him without any signal or warning from said chauffeur of its said approach, which said carelessness and negligence directly contributed to cause the said injuries resulting in the death of said A. L.

That by reason of the aforesaid careless and negligent acts

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of the defendant, resulting in the death of her husband, plaintiff, A. A., has been damaged in the sum of dollars, which sum she is entitled to payment from defendant, and for which sum she now prays judgment and costs.

605. ACTION FOR DAMAGES FOR DEATH OF HUSBAND ALLEGING NEGLIGENCE IN ALLOWING ELECTRIC WIRES TO BECOME BROKEN AND REMAIN IN THE STREET WHERE DECEASED WAS KILLED.

Plaintiff states that the L. G. L. Co., defendant, is a corporation under the laws of, engaged in the business of furnishing and selling electric light throughout the city of, ...; that in conducting said business the defendant had erected and strung upon poles along the streets and alleys of said city wires charged with a certain dangerous and life-destroying fluid and current known as electricity. And that on the day of, 19.., on a certain public highway of said city, to-wit, in an alley, etc.; through and along which alley it then and there had erected and maintained, its said wires, as aforesaid, charged with electricity in the conduct of its said business; and at a point in said alley in the rear of residence No., T. street, the defendant negligently and carelessly permitted its said wires, to the number of six or seven, then and there charged as aforesaid, to become broken in two and to fall to the pavement of said alley, and to remain broken in two and down for a long time then and there while full charged with electricity, as aforesaid, when it knew, or ought by the exercise of any care and caution to have known, that the said wires were so as aforesaid, broken and down and liable if touched by any human being while so broken down and charged as aforesaid to destroy human life. And plaintiff states that while the said wires were then and there in said alley broken in two and down and charged as aforesaid, her said husband, while walking along in the said alley at said point struck with his foot against one of defendant's said wires and was thereby instantly killed by the fault and recklessness and carelessness of the said defendant then and there

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in the premises as aforesaid, to her damage in the sum of dollars, for which sum plaintiff prays judgment.

606. ACTION FOR DAMAGES FOR INJURY RESULTING FROM NEGLIGENCE IN SALE OF POISONOUS DRUG WITHOUT LABELING AS SUCH, BY AGENT OF DEFENDANT.

Plaintiff states that, on or about the day of, 19.., he was suffering from temporary derangement of the organs of hearing of the left ear, and at said date, and long prior thereto, the defendant was engaged in business, in the town of H., county of J. and State of, as a druggist and pharmacist, and kept a stock of drugs and medicines; and whose business it was, and is, to compound, sell and retail medicines and drugs for medical purposes. And, at the date first aforesaid, plaintiff, by and through one W. A. C., applied to said defendant at his store and place of business, for the purchase of one ounce of sulphuric ether, to be used in and about the healing and curing of said derangement of the head and ear of plaintiff.

And that defendant, by his agent and employee, in the person of his son, M. G., did undertake to furnish the plaintiff, by and through the agency of the said W. A. C., the said sulphuric ether, but instead thereof, did carelessly, negligently and unskillfully furnish plaintiff through the medium aforesaid, sulphuric acid, which last-mentioned is a poison, and which was wholly unfit for the uses and purposes for which plaintiff desired to use sulphuric ether; and that said sulphuric acid was not only unsuited to the healing and curing of plaintiff's malady, but was destructive and dangerous to his health and life; and that defendant, by and through the agency of his said son and employee, did represent to plaintiff, through the agency of the said C., that he had put up and given to him one ounce of sulphuric ether, as called for; and that said sulphuric acid was put up by defendant aforesaid in a small vial, or bottle, and delivered to said C. for plaintiff, without labeling the same, or putting any mark, or fixing upon said bottle anything to indicate to plaintiff, or any one else, the nature or character of its contents, or that it contained any poisonous substance; but supposed and be-

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lieved it contained sulphuric ether, as called for by plaintiff, and represented by defendant, in the manner aforesaid; and that plaintiff, so relying upon said representation, and believing the contents of said bottle to be sulphuric ether, and not being able to discover or detect its true contents, and, in ignorance thereof, did, on or about the day of, 19.., use and apply the same to his left ear, with the intention, purpose and expectation of curing his said malady, of which he was complaining, and, as a result of the use and application of a portion of the contents of said vial, or bottle, containing said acid, plaintiff was poisoned.

Wherefore, etc.

607. ACTION FOR LOSS OF TEAM AND WAGON NEGLIGENTLY
PRECIPITATED IN A RIVER WHILE EMPLOYED IN RIP-
RAPPING AND HAULING.

Plaintiff states that on the of, 19.., he owned a team of mules and a wagon, worth dollars; that on or about said date said team was engaged in hauling and depositing rock, under the supervision and direction of defendant, which rock was used by defendant in rip-rapping the bank of the river, and the said defendant, by its agents and servants so engaged in supervising and directing said work of rip-rapping and hauling, then and there willfully, wrongfully and negligently directed the driving of and conducting of said mules and wagon of plaintiff, so engaged; that by said direction and command said defendant caused said mules and wagon to be precipitated into the river, where they were lost, whereby plaintiff has suffered damage to the amount of dollars, for which, and costs, he prays judgment.

608. ACTION FOR DAMAGES RESULTING FROM EXCAVATING
FOR FOUNDATION BY AN ADJOINING OWNER.

Plaintiff states that on or about the day of, 19... the defendants L. were together the owners of a certain lot of ground immediately adjoining that of the plaintiff on the west, and that on or about said day the defendants D. and the defendants L. began to make and excavate a large

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and deep hole, intended for a cellar, upon premises of said defendants L., and continued to excavate until on or about , 19..; that said excavating and digging was done in a careless and negligent manner by the defendants, and that the ground was so excavated that portions of the soil belonging to plaintiff's lot were caused to become detached and to fall, greatly undermining and weakening the foundation supporting plaintiff's house. And that defendants excavated over the line of the lot belonging to the defendants L., and into the lot belonging to plaintiff; that the foundations of plaintiff's said house were exposed to great danger, and that it was the duty of defendants not to leave the same unnecessarily exposed, or exposed for an unnecessary length of time, but in disregard of their duty the defendants, after having made said excavation, commenced to build the masonry foundations of a house in said excavation, working only upon the north, south, and west sides, and not undertaking to build alongside the plaintiff's house at all. That the foundation wall of plaintiff's house was thus carelessly and negligently, and without any regard whatever by the defendants to the danger in which plaintiff's house was placed, left exposed for a period of ten full days after said excavation had been completed, during which time the defendants allowed their said excavation to become flooded with water, which ran against and upon the soil supporting plaintiff's house, greatly weakening and undermining such support, until on or about the day of , 19.., when, in direct and immediate consequence of the wrongful and careless conduct and acts of the defendants, the support of plaintiff's house entirely gave way, and said house, together with all of the furniture and other property of plaintiff contained therein, fell into said excavation and was completely wrecked, demolished, and destroyed.

That by reason of the premises plaintiff sustained damage in the sum of dollars, for which, with costs, he prays judgment against defendants.

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609. ALLEGATION OF NEGLIGENCE OF TITLE EXAMINER IN EXAMINATION OF TITLE.

Plaintiff states that defendant did not carefully and faithfully examine the title to said lot and did not deliver to him a correct and true certificate of the title thereto, but on the contrary negligently and carelessly examined said title to said lot and the records affecting the same, and that said certificate was untrue and erroneous, in this, that at the time it was delivered to plaintiff, the said A. E. was not the owner of the entire fee simple title of said lot, as said certificate set forth, but was the owner of only an undivided one-sixteenth of said fee, and the owner during the natural life of F. S. of a life estate in the other fifteen-sixteenths of said fee, and that said other fifteenth-sixteenths thereof was then vested subject to said life estate in F. M. S., W. H. S., and C. J. A. S., and that defendant by the exercise of ordinary and reasonable care in making its said examination could have discovered said defects in the title of said A. E. to said lot.

Plaintiff further states that by reason of said certificate being erroneous and untrue, and by reason of defendant carelessly and negligently examining the title to said lot as aforesaid, he has been damaged in the sum of dollars.

Plaintiff further states that as soon as he had any knowledge or belief as to said certificate being untrue and erroneous, he called on the defendant and demanded that it make good to him his said damages, and that defendant then, and ever since then has, and now does, refuse so to do.

610. ACTION AGAINST THE OWNER OF PREMISES FOR DAMAGES SUSTAINED BY ONE NOT A TENANT ALLEGING THAT THE PREMISES WERE IN BAD REPAIR AT THE TIME THEY WERE RENTED.

Plaintiff states that heretofore, to-wit, on the day of, 19.., the defendant was the owner of the premises known as No. N. T. street, in the city of, located at the northwest corner of T. streets and L. avenue in said city, upon which premises there is erected a certain business building belonging to defendant, the said building

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fronting on both L. avenue and on said T. street. That defendant, in connection with her said improvements, owns and maintains a vault or cellar under the public sidewalk along and over said T. street in front of her said premises, and that leading from said vault or cellar to and through said sidewalk are several openings for the purpose of permitting light and air to enter from the street into said vault or cellar, and that said openings are covered with iron lids or covers. That on or about said day of, 19.., one of the said lids or covers was and for a long time prior thereto had been, loose, unfastened and entirely insecure, so as to make it a menace and danger to pedestrians walking along said sidewalk and constituting a nuisance thereon. That the said condition of said lid or cover existed at and prior to the time when defendant rented said premises to one A. S., who on said day of, 19.., was the tenant of said building, and that said condition existed continuously from said time down to said day of, when plaintiff sustained the injuries hereinafter set forth.

And plaintiff states that upon said day of, 19.., he was lawfully walking along and over said pavement on T. street in front of defendant's premises, without being aware of or knowing of the dangerous condition of said lid or cover when he stepped thereon, and that the same by reason of its defective and insecure fastening and condition, turned and allowed plaintiff to fall through said opening up to his hips, and that he was severely injured (describe injuries, etc.).

That by reason of said injuries he has suffered damages in the sum of dollars, all caused by the negligence and want of care on the part of defendant in permitting said lid or cover to become insecure and to remain so.

Wherefore, etc.

611. ALLEGATION OF NEGLIGENCE IN ACTION FOR DAMAGES FOR MAINTAINING AN IRON GRATING OF WHICH THE BARS WERE BROKEN, IN THE SIDEWALK IN FRONT OF DEFENDANT'S PREMISES.

Plaintiff states that on the day of, 19.., and for a long time prior thereto, said defendant had maintained

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an iron grating in the sidewalk on said highway in front of and adjoining said premises; that one of the bars of said grating was on the said day of, and had been for a long time prior to that day, broken out so as to leave a space of four inches between the remaining bars of said grating opening into an excavation under said sidewalk. That the said G. avenue and the sidewalk pertaining thereto is a populous thoroughfare over which a large number of people are, and were at all said times, constantly passing. That said R. C. W. was aware of and well knew the dangerous condition of said sidewalk and grating in front of his said premises. The plaintiff B. S., at all the times herein mentioned was residing with his family at number on said G. avenue. That said J. S., who is hereinafter mentioned, is an infant son of said plaintiff, of the age of nine years, residing with his father, the said plaintiff. That it was the duty of said defendant, R. C. W., to maintain said sidewalk and the iron grating aforesaid so as to be safe for the public, men, women and children passing along and using the same. But plaintiff says that defendant so carelessly and negligently maintained the said sidewalk and iron grating therein, in its broken and unsafe condition, without any barriers to prevent persons passing from falling through the broken place in said iron grating; and that the said J. S., the infant son of said plaintiff, on the day of, 19.., while lawfully and properly passing along said sidewalk, and ignorant of the danger thereof, fell into the said space between the bars of said iron grating, and was thereby injured, bruised, wounded and maimed in his left leg, from which said injuries so received as aforesaid, he, the said J. S., from that time to this has lain sick and diseased. That by reason of said wounds, etc.

612. ACTION FOR DAMAGES FOR INJURIES RESULTING FROM AN EXPLOSION OF CHEMICALS.

Plaintiff states that the defendant is a corporation duly incorporated and engaged in the wholesale drug business at, ...; that during the of, 19.., and

for years prior and subsequent thereto, defendant was also engaged in said business at K. C., ...; that plaintiff on the day of, 19.., was in the employ of said defendant as a shipping clerk in its liquor department at K. C., ...; that on said day of, 19.., a certain chest containing certain chemical substances belonging to said defendant was in the possession of defendant at its place of business at said K. C., and was the property and under the control of said defendant; that said chest did not belong to said liquor department, nor did said plaintiff at the time or prior thereto have any knowledge of the contents of said chest, which fact was well known to defendant. That an explosion took place on said day in said chest, and the K. C. fire department, being summoned by defendant, removed said chest into the street adjacent to the defendant's said place of business, where said chest was broken open and its contents scattered over the street. Among the contents of said chest so scattered, as aforesaid, were large quantities of potassium and sodium, which substances are of such a nature that when put in contact with water or immersed therein, they ignite and instantaneously explode. Defendant well knew the aforesaid dangerous character of said substances, yet defendant, its agents and servants, carelessly directed and permitted plaintiff to pick up said sodium and potassium and put the same into a bucket of water and negligently failed to warn plaintiff of the dangerous nature of said potassium and sodium, as aforesaid. Plaintiff had no knowledge of what said substances were or their aforesaid dangerous nature, as defendant well knew. Plaintiff at once proceeded to carry out such instructions of defendant, procured a bucket of water, picked up a piece of one of said substances, placed the same in said bucket of water, whereupon said substances exploded and struck plaintiff, etc.

Wherefore, etc.

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CARS COLLIDING WITH VEHICLES.

613. PETITION WHERE STREET CAR NEGLIGENTLY COLLIDING WITH WAGON, INJURING PLAINTIFF, CHARGING VIOLATIONS OF ORDINANCE, AS TO SPEED, VIGILANT WATCH, ETC.

(Allege incorporation of defendant.)

Plaintiff states that on the day of, 19.., the defendant, by its officers, agents, servants and employees, was running, conducting and managing its said cars on, along and over its said line of railway on J. avenue near and across S. avenue, and then ran its said cars against and upon a vehicle and delivery wagon then being driven by plaintiff, and in which he was then riding, whereby said wagon was violently shaken, overturned and broken, and plaintiff was thrown therefrom and was greatly injured as follows: (describe).

That said injuries to plaintiff are permanent and resulted from, and were occasioned by, the carelessness, negligence and recklessness of said officers, agents, servants and employees of defendant, while running, conducting and managing said cars, at and prior to the time they were so run upon and against said wagon and by reason thereof plaintiff suffered great bodily pain and mental anguish and lost much time.

That by an ordinance of said city, it was then provided that the conductor, motorman, gripman, driver, or any other person in charge of each car shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible, and, contrary to said provision of said ordinance, the conductors, motormen, gripmen and other persons then in charge of said cars, at and prior to the time they were so run against and upon said vehicle, negligently, carelessly, and recklessly failed to keep a vigilant or any watch for vehicles on said track or moving towards it, and carelessly, negligently and recklessly failed, on the first appearance of danger to said vehicle, which was then approaching or on said track, to stop said cars in

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the shortest time and space possible, or before said vehicle had been so struck.

That by an ordinance of said city, the rate of speed at which defendant was then permitted to run or draw its said cars, at the place where plaintiff was so injured, was forbidden to exceed or be greater than at the rate of miles per hour, under any circumstances, and, contrary to said provision of said ordinances said cars, at and prior to the time they were so run against and upon said wagon, were negligently, carelessly, and recklessly being run and drawn at a rate of speed exceeding miles per hour.

That by an ordinance of said city, it was then provided that whenever any car is about to pass another car going in the opposite direction, at a point where it is permissible to passengers to alight from or to board a car, said car shall proceed at a rate of speed not over three miles an hour, and the motorman, driver or person in control thereof shall ring a warning gong or bell.

That at and prior to the time said cars were so run against and upon said wagon, they were about to pass each other going in opposite directions, on said J. avenue, at said S. avenue, a point where it was permissible to passengers to alight from and to board said cars, and said cars then proceeded at a rate of speed of over miles an hour, and the motormen, drivers and other persons in control thereof did not then ring a warning gong or bell, which said rate of speed and failure to ring a warning gong, was occasioned by their carelessness, negligence and recklessness.

That by the negligence, carelessness and recklessness of said officers, agents, servants and employees of defendant, at and prior to the time that plaintiff was so injured by said cars striking said wagon, the gong or bell thereof, with which it was provided for that purpose, was not sounded, nor was there any warning given of its approach, and said wagon was, at the time said cars were so approaching it, at a sufficient distance from it to be seen, and it was then seen by said officers, agents, servants and employees of defendant, who were then running, conducting and managing said cars; and by

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the exercise of ordinary care on their part, the said wagon could then have been seen by them, and they became and might have become, aware of the danger to which said wagon and plaintiff were then exposed in time to have stopped said car, by the use of ordinary skill and care, which they then negligently, recklessly and carelessly failed to use, and have stopped said car and prevented so striking said wagon and injuring plaintiff.

That at and prior to the time said wagon was so struck by said cars, said cars were approaching in different directions, the intersection of said J. and S. avenues, and said cars, while so moving, were negligently, carelessly and recklessly run by said officers, agents, servants and employees of defendant, at a high and dangerous rate of speed, without keeping the same under their control or giving any warning of their approach, and without keeping a vigilant watch, or any watch whatever, for vehicles on the tracks on which they were moving, where, as they well knew, vehicles were accustomed to pass.

That by reason of the aforesaid negligence, carelessness, and recklessness, of said officers, agents, servants and employees of defendant, in running, conducting and managing said cars, whereby they were run upon and against said wagon, by which plaintiff was thrown therefrom and injured as aforesaid, he has been damaged in the sum of dollars, for which he asks judgment.

614. ACTION FOR DAMAGES DUE TO COLLISION OF STREET CAR WITH WAGON DRIVEN BY PLAINTIFF, WHERE THE WHEELS WENT INTO A HOLE IN THE STREET, ALLEGING FAILURE TO OBSERVE VIGILANT WATCH ORDINANCE.

That on the day of, 19.., the plaintiff was lawfully driving a team of horses attached to a loaded wagon northward on at its intersection with street, when the wheels of the wagon he was so driving went into a hole in said street at their intersection, and said team was unable to pull the wagon further and became stalled, and in endeavoring to get said wagon pulled out of said hole,

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said team was upon the track of the defendant, and while said team was so on the track of said company on said streets at said place, and while said wagon and the wheels thereof were at and near said defendant's track, the defendant's motorman and conductor in charge of its south-bound car carelessly and negligently and without using ordinary care to control or stop said car, caused and suffered said car to collide with said team and a part of said wagon whereby plaintiff was thrown from said wagon to the street, and one of the horses of said team was thrown and fell upon the plaintiff, greatly and permanently injuring plaintiff, etc. (describe injury).

And for another and further assignment of negligence of defendant the plaintiff avers that at the time of his said injuries, there was in force in the city of, an ordinance of said city, whereby it was provided that motormen and conductors of street cars should keep a vigilant watch for vehicles and persons either on its track or moving towards it and upon the first appearance of danger to such vehicle or person, the car should be stopped within the shortest time and space possible, and plaintiff avers that at the time of said collision and his injuries defendant's motorman and conductor in charge of its said car failed to keep such vigilant watch and failed to stop said car within the shortest time and space possible upon the first appearance of danger to said vehicle and plaintiff, which violation of said ordinance directly contributed to cause said collision and plaintiff's said injuries.

615. ALLEGATION OF NEGLIGENCE IN CASE OF STREET CAR COLLIDING WITH BUGGY.

Plaintiff states that said injuries were occasioned by the negligence and lack of care on the part of defendant's agents and servants while operating defendant's cars, in this, that said defendant saw, or by the exercise of reasonable care and foresight might have seen plaintiff's buggy on its right of way and consequently plaintiff's imminent danger, but, notwithstanding the facts aforesaid and regardless of its duty

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to operate its cars with skill and care, defendant, without having rung any alarm bell or in any wise having notified plaintiff of its approach on said right of way, negligently and carelessly allowed the grip car to which was attached said train of cars, to run into and break plaintiff's buggy, thereby causing the injury above complained of.

**616. ACTION BY ONE RIDING IN A HIRED LIVERY CARRIAGE
DUE TO COLLISION OF ELECTRIC CAR RUN IN VIOLA-
TION OF A MUNICIPAL ORDINANCE AS TO LIGHTS ON
THE CAR, DANGEROUS SPEED AND FAILURE TO KEEP
A VIGILANT WATCH.**

Plaintiff states that on or about the day of, 19.., about o'clock in the evening of that day, the plaintiff, a physician, was being driven in a hired livery carriage west along M. avenue, a street running east and west, at its intersection with B. avenue, a street running north and south, in the city of, and that the lamps on the said carriage were lighted and burning brightly; that at said time and place, and as such carriage in which plaintiff was riding was crossing defendant's south-bound or western street railway track, one of defendant's cars, propelled by electricity and south-bound on said track, with great speed, force and violence, struck and collided with said carriage, driving plaintiff's right arm into his floating ribs, etc.

And plaintiff avers that at the time of receiving said injuries, there was in force in the city of an ordinance known as ordinance No., approved, 19.., which ordinance defendant long prior to the happening of the accident complained of, accepted and agreed to be bound by the terms and provisions thereof; that section of said ordinance in substance provides that all street cars after sunset shall be provided with signal lights; that no car shall be drawn at a greater speed than eight miles per hour, and that the conductor, motorman, gripman, driver or any other person in charge of each car shall keep a vigilant watch for all vehicles, either on the track or moving towards it, and on the first appearance of danger to such vehicle, shall stop the car in the shortest time and space possible.

And plaintiff avers that though at the time of receiving said injuries aforesaid, it was long past sunset and dark, defendant had negligently failed to provide said car with signal lights, or to place a headlight on said car; that defendant's servants in violation of said provision of said ordinance were running said car southwardly on B. avenue towards M. at the time said injuries were inflicted, and immediately prior thereto, at a careless, negligent and dangerously high rate of speed, to-wit, at a rate of speed far in excess of eight miles per hour; that defendant's servants in charge of said car, in violation of the provisions of said ordinance hereinabove referred to, negligently failed to keep a vigilant watch ahead for vehicles moving towards the track upon which said car was running, and negligently failed to stop or attempt to stop or check the speed of said car in the shortest time and space possible, when they saw, or by the exercise of ordinary care or diligence could have seen the vehicle in which plaintiff was riding, in a position of danger, in time to have stopped said car before striking said vehicle, or to have so checked its speed as to have avoided said collision; and for another and further assignment of negligence, plaintiff states that at the time and place of receiving said injuries aforesaid, defendant's servants in charge of said car negligently failed to sound the gong or to give warning of said car's approach.

617. ALLEGATIONS OF NEGLIGENCE IN AN ACTION WHERE PERSON WAS STRUCK AT A CROSSING AND KILLED BY A PASSENGER ENGINE.

Plaintiff states that the defendant, its agents and employees carelessly and negligently used an engine drawing said train that was defective and out of repair and was leaking steam, and was supplied with a defective and poor and inefficient headlight.

That the defendant failed to erect or maintain at said crossing an automatic or electric alarm-bell or any alarm, bell or other method of warning persons using said crossing of the approach of trains.²²

²² Form in *Osborn v. Atchison, Topeka and Santa Fe Ry. Co.*, 75 Kan. 746.

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618. ALLEGATIONS OF NEGLIGENCE WHERE THE DRIVER OF
A WAGON WAS STRUCK WHILE CROSSING A STREET
CAR TRACK.

Plaintiff states that the defendant, by and through its agents, servants and employees in charge of said car, unnecessarily, carelessly, negligently, maliciously and wantonly ran said car at the high, reckless and dangerous rate of speed of about miles an hour, without ringing any bell, sounding any alarm, or in any way warning the plaintiff of the approach of said car, and without attempting to check the speed thereof after seeing and knowing the plaintiff's dangerous position on the track.²³

COLLISION OF STEAM AND STREET CARS WITH PEDESTRIANS.

619. ALLEGATIONS OF NEGLIGENCE WHERE DECEASED
WHILE UPON THE TRACK OF DEFENDANT WAS STRUCK
AND KILLED.

Plaintiff states that on said day of, 19.., the defendant, by its agents, servants and employees, while running and operating a locomotive and train of cars over its said road, in said county, did so carelessly, negligently, recklessly, heedlessly and unskillfully run, manage and conduct its said locomotive and train of cars over its said road at a point in said county, that said locomotive and train of cars ran against, struck and fatally injured and wounded F. S., of which said injury and wounding the said F. S., on said day of, 19.., in said county, died.

620. SAME—ANOTHER FORM.

Plaintiff states that the defendant, on the day of, 19.., by its servants, agents, and employees, carelessly, negligently, unskillfully, and recklessly, ran one of its engines and trains of cars upon and over the said E. B. B., and thereby struck and inflicted grievous bodily injury upon the said E. B. B., by reason of which the said E. B. B. was then and there instantly killed.

Plaintiff states that said E. B. B., was run over and killed,

²³Form in Metropolitan St. Ry. Co. v. Slayman, 64 Kan. 722.

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as aforesaid, at a point on defendant's railroad track between the said city of St. J., and the said town of E., about one mile southeast of the said city of St. J.

621. ACTION BY PARENTS FOR DAMAGES FOR DEATH OF CHILD, CAUSED BY BEING STRUCK BY CARS WHILE ATTEMPTING TO CROSS TRACKS.

That on the day of, 19..., these plaintiffs were the parents and next of kin of one M. G. W., an infant of the age of years, then residing with said plaintiffs at the city of W., C. county, Kansas; that on said day said M. G. W. was traveling along and upon a certain street known as F. street, in the city of W., in the county of C., State of Kansas, which said street is a public highway, and said street and public highway crosses the track of the defendant's railway in said city of W., Kan.; and when said M. G. W. reached said crossing, the defendant had three cars attached to a caboose standing on its track and across said street and public highway. Said three cars attached to said caboose had so been standing across said street and public highway for more than one hour preceding the injury hereinafter alleged and in violation of sec. of ordinance No. of the city of W., Kan., and other ordinances of said city; and while said M. G. W. was attempting to cross said track of said defendant at said crossing, the defendant, by its servants, caused one of its locomotives and train of cars to approach said crossing, by backing and passing rapidly over and along the track of the said railroad, and ran said locomotive and cars with carelessness and gross negligence, and striking the said three cars attached to said caboose which were upon the same track, and negligently and carelessly omitted, while so approaching said crossing, to give any signal, by bell, or whistle or lights or otherwise, by reason whereof, the said M. G. W. was unaware of the approach of said locomotive and train which was backing, and by reason of said gross negligence of the defendant, and in violation of sec., ordinance No., of the city of W., Kan. (and without any fault or negligence of the said M. G. W.), the locomotive and train of cars struck the said M. G. W. with great violence, to the

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ground, and under the wheels of the cars of the defendant, and dragged her, the said M. G. W. while so under the wheels of the defendant's cars as aforesaid, for more than feet along and over the track of the defendant, thereby breaking and fracturing the left lower limb, and lacerating, mangling and tearing the flesh from the left lower limb, and otherwise injuring the said M. G. W.; that by reason of said injuries the said M. G. W. on the day of, 19.., did die; and that no personal representative is or has been appointed of or for said deceased; and that by reason of said injury and death of said M. G. W. these plaintiffs have been damaged in the sum of dollars.²⁴

622. ALLEGATIONS OF NEGLIGENCE IN AN ACTION WHERE PLAINTIFF WAS INJURED BY BEING STRUCK BY MOTOR CAR AT A STREET CROSSING.

Plaintiff states that on, 19.., he with his horse and wagon was driving northward on avenue in and, when about half way between and-streets in said city on the west side of avenue, desiring to cross to the west side of said avenue, and turned his horse to do so, but, as the horse stepped between the two east rails of defendant's tracks on said street, a motor car belonging to defendant, propelled by electricity and running at a dangerously and negligently high rate of speed, and without any warning to plaintiff, negligently ran into and struck plaintiff's horse, which was hitched to the wagon in which plaintiff was riding, and said horse became entangled in the fender on the front end of defendant's said motor car.

Plaintiff says that when defendant's motor car struck his horse, as aforesaid, the motorman in charge of said car, both seeing and knowing the imminent danger in which plaintiff was placed by the negligence of said defendant, and having the power to stop said car, in absolute disregard of defendant's duty to stop said car and avoid injury to plaintiff, negli-

²⁴ Form in Weber v. Atchison, Topeka and Santa Fe R. R. Co.,
54 Kan. 389.

gently failed even to diminish the speed of said car, but on the contrary said motorman continued to run said car at great speed for about the total distance of a block, pushing, dragging and carrying plaintiff's horse and wagon for the entire distance.

Plaintiff says that, after defendant's motor car struck his horse as aforesaid, defendant's motorman who was in charge of said car, and who could have stopped said car, and whose duty it was to stop said car, negligently continued to run it at great speed, whereby plaintiff was greatly and seriously injured, without the fault of plaintiff, for after defendant's motor had, as aforesaid, pushed, dragged and carried plaintiff's said horse and wagon for about 120 feet, plaintiff was forcibly and violently thrown from his wagon, and hurled to the pavement, and was seriously and severely cut, injured and bruised about his head, back, spine and legs, his right leg being so badly broken that it was necessary, in order to save plaintiff's life, to amputate his leg, which was accordingly done, whereby the plaintiff was made to suffer great pain, and physical and mental anguish, and has become a cripple for life and plaintiff still suffers from the injuries sustained by him in his head and spine.²⁵

623. ALLEGATION OF NEGLIGENCE WHERE STREET CAR COLLIDED WITH PEDESTRIAN AT CROSSING, CHARGING NEGLIGENCE AND VIOLATION OF VIGILANT WATCH ORDINANCE. (ACTION BY WIFE.)

1. That on the day of, 19.., the plaintiff's husband, M. M., was lawfully on the crossing of W. and streets at or near the east crossing thereof when defendant's servants in charge of their west-bound car carelessly and negligently and without using any care to give warning of the approach of said car to said crossing or to said M. M., and without using any care to watch out for persons on said crossing and without using any care to slow up or stop said car and avert injury to said M., did cause and suffer said car to strike and so injure said M. that he died from said injuries at on the day aforesaid.

²⁵ Form in Omaha Street R. Co. v. Larson, 70 Neb. 591.

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2. And for another and further assignment of negligence *the plaintiff* avers that at the time of the death of her husband there was in force within the city of an ordinance of said city by which it was provided that motormen and conductors of each car should keep a vigilant watch for persons on foot, either on the track or moving towards it, and upon first appearance of danger to such person the car should be stopped within the shortest time and space possible, and *the plaintiff* avers that at and before the time that said car struck and injured her husband the motorman and conductor of said car were failing to keep such vigilant watch and failed to stop said car on first appearance of danger to her husband as he moved towards said track and was upon said track, which violation of said ordinance directly contributed to cause the injury and death of plaintiff's husband.

624. ALLEGATIONS OF NEGLIGENCE WHERE STREET CAR STRUCK PEDESTRIAN WHO FELL UNCONSCIOUS UPON CAR TRACK.

Plaintiff further avers that on or about the day of, 19.. at about o'clock in the morning of said day, plaintiff in the exercise of ordinary care proceeded on foot northwardly along K. where it intersects St. L. avenue and defendant's street railway tracks; that as plaintiff was thus proceeding and in the exercise of ordinary care, and was in the act at said time and place, of crossing defendant's northern or west-bound track, for reasons unknown to this plaintiff, he was rendered suddenly unconscious, and fell insensible upon said track.

Plaintiff states that while he was thus lying upon said track in an unconscious condition, one of the defendant's street cars in control of a motorman in defendant's employ, west-bound along said track, with great speed, force and violence, ran upon and against the plaintiff, etc.

Plaintiff states that when he fell as aforesaid unconscious upon said track, said car was at least feet distant from him, and the motorman in charge of said car saw, or by the exercise of ordinary care could have seen the plaintiff

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lying upon said track, and in danger of injury, in time by the exercise of ordinary care to have stopped said car and avoided colliding with plaintiff, but that said motorman negligently failed to do so.

Plaintiff further states that said injuries received by him as aforesaid, were sustained wholly and immediately in consequence of the negligence and carelessness in failing to stop said car in time to have avoided said accident.

625. ALLEGATION OF NEGLIGENCE WHERE TRAIN STRUCK PEDESTRIAN WHILE CROSSING STREET.

Plaintiff states that, on the morning of the day of, 19.., while plaintiff, the said A., was walking along said F. or M. street, between C. and B. streets, as she lawfully might do, defendant, in an unlawful manner, caused one of its locomotives and train of cars to be run and conducted along and over said F. or M. street in so negligent, careless and reckless a manner as to strike and run over plaintiff A., without any negligence on her part contributing thereto.

Plaintiff further states, that no bell was rung on said locomotive or train of cars while running over said public street, as so required by proper and prudent management, and that said train was permitted to run along said street at a much greater speed than six miles per hour, and without giving any signal or warning of its approach.

And plaintiff further states, that in wrongfully causing and permitting said cars to run along said public thoroughfare as aforesaid, defendant also violated the provisions of ordinance No. of the city of, entitled "An ordinance," etc., approved, 19.., by which it is provided that when running within the limits of the city of, the bell of the engine shall be constantly sounded.

Form of petition for damages caused by being kicked by a horse. Durrell v. Johnson, 31 Neb. 796, 798.

Form of petition in action against railroad company for damages for negligently constructing a bridge so as to obstruct the flow of ice and water. Omaha & R. V. Ry. Co. v. Standen, 22 Neb. 343.

Form of petition in action for damages because of negligent con-

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struction and grading of roadbed for railroad track. *Fremont, E. & M. V. Ry. Co. v. Marley*, 25 Neb. 138.

Form of petition in action for damages from injuries received while working as foreman of a section, alleging injuries resulting from being compelled to handle heavy rails without sufficient help. *Atchison, Topeka & Santa Fe R. R. Co. v. Schroeder*, 47 Kan. 315.

Form of petition in action against a bank for damages for failure to take proper steps to collect notes placed in its hands, before maker became insolvent. *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28.

Form of petition in action for damages by widow whose husband was killed while working in the railroad yards by being struck by a switch engine. *Railway Co. v. Taber*, 7 Kan. App. 481.

Form of allegations of negligence in an action for damages sustained by a laborer while working in a large well being dug by the railroad company at its round house. *Chicago, Kansas & Western Ry. Co. v. O'Connell*, 46 Kan. 581.

Allegations of negligence in an action for damages alleged to have resulted from the selling of coal oil mixed with gasoline. *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107.

Form of petition in action for damages for injuries received by infant who was thrown upon the track of the street car and injured by reason of negligence of agents in charge of the car. *Brooks v. Lincoln Street Ry. Co.*, 22 Neb. 816.

Allegations of negligence in action by employee who was injured by being thrown from a hand car, by reason of the negligence of the foreman or superintendent. *Sioux City & Pac. Ry. Co. v. Smith*, 22 Neb. 775.

Form of petition in action for damages for personal injuries resulting from a team running away, alleged to have been frightened by defendant negligently discharging steam from its locomotive. *Omaha & R. V. Ry. Co. v. Clark*, 35 Neb. 867.

Form of petition in action for damages for injuries received by reason of an iron rail or bar protecting an area-way giving way and letting plaintiff fall to the sidewalk. *Hotel Association v. Walter*, 23 Neb. 280.

Sufficient allegations of negligence in *Rouse v. Ledbetter*, 56 Kan. 348.

CHAPTER XLVII.

NUISANCE.

- 626. Action to enjoin the maintenance of a public nuisance, a disorderly and disreputable theater.
 - 627. Action for damages for alleged nuisance and to restrain defendant from continuing use of brick kilns alleged to give forth smoke and poisonous gas damaging plaintiff's crops.
 - 628. Action to abate and enjoin the maintenance of a nuisance under the prohibitory liquor law.
 - 629. Action against a city for damages caused by the discharge of sewage into a creek running through plaintiff's farm.
 - 630. Allegations in an action against a city to restrain it from committing a public nuisance by discharging sewage into an abandoned channel of a river.
 - 631. Allegations in action against a drainage district for damages caused by flooding of plaintiff's lands.
 - 632. Allegations in action against a railroad for changing course of stream by embankment, flooding plaintiffs' property and washing gullies and trenches therein. (One count of petition.)
 - 633. Allegations in action for damages to growing corn alleged to have been caused by the escape of gases from a brick kiln.
 - 634. Allegations where nuisance was erected by defendant's predecessor—Knowledge of existence.
- 626. ACTION TO ENJOIN THE MAINTENANCE OF A PUBLIC NUISANCE, A DISORDERLY AND DISREPUTABLE THEATER.**

Comes now the plaintiff and for its cause of action alleges:

1. That E. W. J. is the duly elected, qualified and acting county attorney of L. county, State of

2. That the defendants H. H. R. and R. S. R. are now, and for a long time past, have continuously operated and carried on a public resort on the northeast corners of street and avenue, in the city of G. and county of L., in which said resort the public are invited and requested to enter, and in which said resort, lewd and lascivious songs are sung, and lewd persons of both sexes constantly congregate,

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and lewd and lascivious exhibitions are given. That in said resort above mentioned, many lewd persons of both sexes congregate and come together for immoral purposes, and for drinking and tipling, and said persons so assembled as aforesaid in said resort, are immoral, noisy and boisterous, to such extent that all persons in said neighborhood are disturbed and inconvenienced.

3. That the acts and doings in said resort, both by the persons employed therein by said defendants and by the persons therein assembled, are grossly lewd and immoral, that many lewd women assemble constantly in said resort, and solicit the men there assembled for improper purpose, and exhibitions and plays are given and songs sung which are of a lewd, filthy and immoral character, and offend decency. That said songs are of such an immoral character that it is improper to set them in this petition.

4. That the said lewd women assembled in said resort with the consent and by the procurement of the defendants, solicit and importune the persons there assembled to drink and engage in loud, boisterous and obscene conversation.

5. That the persons so assembled in said resort, by and with the consent of the defendants, make loud noises and sing obscene songs until very late at night, and thus disturb and inconvenience the good citizens living in that part of the city of G.

6. That the defendants are conducting a resort as above set out, that is a common nuisance and offends decency.

Therefore the plaintiff demands judgment: (1) that the said defendants, their agents, servants and employees be enjoined from conducting said nuisance; (2) that a restraining order issue until the hearing; (3) for other and further relief as may be just; (4) for costs.¹

637. ACTION FOR DAMAGES FOR ALLEGED NUISANCE AND TO RESTRAIN DEFENDANT FROM CONTINUING USE OF BRICK KILNS ALLEGED TO GIVE FORTH SMOKE AND POISONOUS GAS DAMAGING PLAINTIFF'S CROPS.

Plaintiff for cause of action against defendant alleges:

¹ From form in *Reaves v. Ty. of Okla.*, 13 Okla. 396.

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That the said defendant, the J. C. P. B. Co., is a corporation created by and existing under and by virtue of the laws of the State of Kansas, and engaged in the business of burning brick, at J. C., in said county; that said plaintiff is now and has been for a long period of time the owner and in the possession of the following described real estate in the said county of G. and described as follows, to-wit: (here describe) that at the time and times hereinafter mentioned the said plaintiff was in possession of said real estate except a small tract of about acres leased to the said defendant company as hereinafter stated; that said land has been cultivated in fall wheat for several years last past, and was sowed to fall wheat in the fall of 19..; that said plaintiff had growing upon said land, in the season of 19.. and 19.., ... acres in fall wheat, which, in the spring of 19.., was growing and in good condition on said land owned and possessed by the said plaintiff; that on or about the day of, 19.., the said defendant brick company leased from the plaintiff about acres of said land, for the period of years, with option to renew said lease from year to year for years; said lease to commence on the day of, 19..; said defendant company was to have the use of the water power owned by the said plaintiff, and known as F.'s mill, to run one E. brick press; the rental was of dollars per month; said lease was upon further condition, that said defendant company was to carefully and properly manage and control the power so to be supplied, and in no way to interfere with or injure the property rights of the said plaintiff, and to commit no injury on the said premises of the said plaintiff during the existence of said lease. A copy of said lease is hereto attached, marked "exhibit A."

Plaintiff states that at the time of making said lease the plaintiff was unacquainted with the methods to be used by the said defendant brick company in burning brick, and was not informed by the said defendant company whether it would use bituminous coal or wood in burning its kilns. The said defendant company went into possession of said acres of land and erected kilns thereon, and during the season

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of 19.. burned several kilns of brick thereon. In burning said kilns of brick, said defendant company, by its employees and agents, used bituminous coal in considerable quantities, placed in spaces left in the kilns among the unburned brick; and also in the flues left in said kilns for the purpose of burning said kilns. By the methods used by the said defendant company, and by the fuel used, to-wit, bituminous coal, during the burning of said kilns, a very considerable quantity of corrosive gas, called sulphuric acid gas, was generated, and, having been compressed to a certain degree, when allowed to escape from and above said kilns, was carried up by draft and disseminated above the kilns of the said defendant company and in the direction of the wind, for quite a distance, and over and upon the growing wheat of the plaintiff. Said sulphurous acid gas, so generated in the burning of said brick kilns by the use of bituminous coal, was and is injurious to vegetation of all kinds, and particularly growing wheat. This poisonous gas, when carried upon the wind, falls upon plants in minute amounts, and, when the blades and leaves are damp, the gas is absorbed and vegetation blighted. During the months of, ..., and, 19.., the smoke and poisonous gas from the kilns of the said defendant company, impregnated with sulphurous acid gas produced by the use of bituminous coal, was carried from the said kilns of the defendant company and settled over and upon the growing wheat of the said plaintiff upon the above-described premises, and thereby destroyed and injured the grain then forming on the stems of said wheat, and so blighting said wheat by said poisonous gas settling upon said crop, thereby destroying acres of said wheat, of the value of dollars. In addition to said acres being destroyed so that it was a total loss, ... acres of said wheat was greatly damaged and injured by said smoke and gas from said kilns, so that it was almost worthless, to the damage of the said plaintiff in the sum of dollars, in the aggregate damages to plaintiff in the sum of dollars, by means of and from the effects of the said poisonous gases, generated in and coming from the said defendant's brick kiln. By reason of such acts

of the defendant company in the use of bituminous coal in burning its said brick kilns, the plaintiff has suffered great damage in the loss of his crop of wheat. If the said defendant company continues the use of bituminous coal in burning its said kilns, as it threatens to do, it will work great and irreparable loss and damage to the said plaintiff, and to the nuisance of the said premises of the said plaintiff.

Plaintiff states that on or about the day of, 19.., plaintiff requested the defendant company to remove said brick kilns from said premises, and to abate said nuisance, but it has not done so; but said defendant company still maintains said brick kilns, and is still engaged in burning brick, by the use of bituminous coal as fuel, which, if continued, will kill vegetation and the crop which plaintiff is desirous of sowing upon said premises. If said defendant company continues the use of bituminous coal as fuel in burning its said kilns, the plaintiff will be unable to cultivate said premises or derive any benefit therefrom; and if said nuisance is continued the plaintiff must inevitably suffer great and irreparable damages, and his property thereby be greatly depreciated in value.

Wherefore plaintiff prays judgment against the said defendant company for the sum of dollars, his damages so as aforesaid sustained, and for a decree upon the final hearing of this case perpetually enjoining the defendant company from using bituminous coal or other combustible material which will generate poisonous gas injurious to vegetation and crops growing upon the plaintiff's premises, while burning its said brick kilns, and for such other and further relief as in equity he may be entitled to, and for the costs of suit.²

628. ACTION TO ABATE AND ENJOIN THE MAINTENANCE OF A NUISANCE UNDER THE PROHIBITORY LIQUOR LAW.

The plaintiff complains of the defendant and for cause of action against him alleges and states:

That heretofore, to-wit, for more than two years prior to the filing of this petition and from that date and up to and in-

² Form in *Fogarty v. Junction City Pressed Brick Co.*, 50 Kan. 478.

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cluding the date of the filing of this petition, the defendant was and is now the owner in fee simple of the following described real estate, to-wit: (describe property) in the city of O., F. county, Kansas, according to the original survey. That on said premises is situated a stone and brick building, which said building faces on M. street in the said city. The plaintiff avers that said building has been continuously for more than two years last past and up to and including the date of filing this petition, kept and maintained by the defendant as a common drinking saloon, and as a place for the unlawful sale of intoxicating liquors to be then and there used and drank at a common bar, and drank as a beverage, and where intoxicating liquors are sold, bartered and given away in violation of law, and where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage and where intoxicating liquors are kept for sale, barter and delivery in violation of law, and not to be sold or used for medical, scientific or mechanical purposes.

And the defendant for a long time past and including all the time herein mentioned and up to and including the date of the filing of this petition was and is now engaged in said building and on said premises above described in the business of unlawfully selling intoxicating liquors as aforesaid and in keeping and maintaining such place as aforesaid.

That said defendant kept and still keeps said intoxicating liquors in said building, the same being contained in bottles, kegs, barrels, cases and demijohns, and uses a common bar and such furniture and fixtures as is usually used in a drinking saloon and unlawfully sells, barter and gives away intoxicating liquors daily to men and boys who congregate in said building and on said premises for the purpose of obtaining said intoxicating liquors as a beverage.

The plaintiff further alleges and charges the fact to be that said real estate hereinbefore described so used as aforesaid for the unlawful purpose as aforesaid, is liable for and subject to a lien for the costs of this action and for plaintiff's attorney fees. That \$. is a reasonable attorney's fee for the preparation and trial of this cause in the district court

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for each time it is tried, and that \$. is a reasonable attorney's fee for preparing and presenting the cause to the supreme court.

Plaintiff further says, that by reason of the occupancy of the premises above described by the said defendant as a common drinking saloon and as a place for the unlawful sale of intoxicating liquors to be then and there used and drank as a beverage, and where intoxicating liquors are sold, bartered and given away in violation of law, and where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are kept for sale, barter and delivery in violation of law the place has become, and is now a common public nuisance and a place where idle men and boys assemble and congregate.

That said defendant will continue to use and occupy said building and premises aforesaid, for the unlawful purpose aforesaid, unless restrained by an order or by a decree of this court.

Wherefore, the county attorney as aforesaid on behalf of the state, prays that said premises, to-wit, the same premises hereinbefore described, and the building situated thereon, may be adjudged a common public nuisance, and that an order be issued to the sheriff of F. county, directing him to forthwith shut up and abate said place above described, and seize all intoxicating liquors, and all vessels, boxes and things containing said intoxicating liquors belonging to said saloon. That the said defendant, his servants, agents and employees, may be perpetually restrained and enjoined from using or permitting to be used said premises or any part thereof as a place where intoxicating liquors may be kept for sale or gift, and where intoxicating liquors are sold, bartered, or given away in violation of law, and where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are kept for sale, barter and delivery in violation of law. And that in the meantime this defendant, his servants, agents and employees may be restrained and enjoined until further orders of this court from keeping for sale or gift or use in or about said

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premises any intoxicating liquors, and from keeping and maintaining said premises as a place where intoxicating liquors are kept for sale, barter and delivery, and where persons are permitted to resort for the purpose of drinking intoxicating liquors or elsewhere in said county.

And the plaintiff further prays, that the costs of this action including attorney's fees as above plead be taxed against this defendant, and that the same be decreed a lien on the above-described premises and that the said premises be sold to pay the same, and for such other and further relief as the nature of the case may require.³

639. ACTION AGAINST A CITY FOR DAMAGES CAUSED BY THE DISCHARGE OF SEWAGE INTO A CREEK RUNNING THROUGH PLAINTIFF'S FARM.

The plaintiff, above named, complains of the defendant, and alleges:

1. That the defendant is a municipal corporation of the State of, duly organized, and a city of the first class, having a population of inhabitants, and through which flows a stream of water, to-wit: C. creek.

2. That she is and prior to, and at the time of, the commission of the grievance hereinafter mentioned was, lawfully seized in fee simple in and to the real property described as follows, to-wit: (here describe) through which flows the said C. creek which with its shores and banks are included within said boundary lines and owned by plaintiff.

3. That the plaintiff with her family is and was during the time above mentioned in the possession of said property and in the occupancy of the dwelling house erected thereon.

4. That prior to the commission of the grievances aforesaid the plaintiff at great expense improved said real estate, especially for gardening purposes in raising vegetables for market. The said improvements consist of a water reservoir feet long, ... feet wide and feet deep, located near the bank of said creek, near which was, and is also erected and in operation a large windmill and water

³ From form in record in State of Kansas ex rel. v. Cowdery, 71 Kan. 450.

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pump connecting said stream and reservoir, drawing an inch stream of water from said creek to said reservoir, keeping the same full of water, from which reservoir were also constructed to all parts of said land, ditches and drains used in irrigating said land from the waters of said creek through said reservoir, also a cold storage house and a warm storage house for the preservation of vegetables, both summer and winter; also hot house for the early propagation of esculent plants; also houses and barns for horses, cows, hogs, and poultry, necessary for the home and conduct of the gardening business; also the said reservoir was to its capacity stocked with a great supply of fish; also was kept thereon horses, cattle, and hogs, which had free access to said creek and reservoir for water; from which said land, improved and used as aforesaid through the sale of vegetables, milk, butter and fish, the plaintiff realized and received large money profits and returns, and also supplies for family use.

5. That the waters of said C. creek flow north through and from the defendant city about miles to and through the plaintiff's land aforesaid, and that the plaintiff was entitled to have had, and ought still to have the use and benefit of the water of said stream for her horses, hogs and cattle, irrigation, and other purposes, yet, the said defendant, by its officers, agents and employees, well knowing the premises, did on the day of, 19..., wrongfully and unlawfully connect its sewer system with said C. creek at a point between said land and defendant city, so that all the excrement from the inhabitants of said city and their dwellings was and ever since has been wrongfully and unlawfully discharged into said creek. And the said defendant did then and thereby wrongfully and unlawfully pollute and disturb the water of said creek so that it became foul and impregnated with poisonous and noxious substances and emitted a noisome and poisonous stench, injurious to the health of plaintiff and her family and almost unbearable.

Whereby, the enjoyment by said plaintiff and her family of the said land as a home and dwelling place has been and is interfered with, and the same has been rendered uncom-

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fortable, unwholesome and unfit for habitation; and the water of said stream has become unfit for stock, and the plaintiff will be compelled to resort to artificial means for water for her horses, cattle and hogs, and the ground has become so impregnated with the water of said stream that water from wells thereon is injurious to health and dangerous for domestic use; and the water of said stream has been rendered unfit for irrigation purposes by reason of the increased danger to health, and also rendering vegetables raised thereon, largely unmarketable through fear by consumers of contracting disease therefrom; and whereby the fish in said reservoir have died, and the said premises rendered useless for the purpose for which they were purchased and improved as aforesaid; by reason of which and all of which aforesaid the value of said land and premises was greatly depreciated to her damage in the sum of dollars.

Wherefore, plaintiff prays judgment against said defendant for the sum of dollars and costs of suit.⁴

630. ALLEGATIONS IN AN ACTION AGAINST A CITY TO RESTRAIN IT FROM COMMITTING A PUBLIC NUISANCE BY DISCHARGING SEWAGE INTO AN ABANDONED CHANNEL OF A RIVER.

That said defendant has for a long time past discharged and now discharges its sewage and other noxious substances upon premises, near or adjoining said city on the north, thereby producing noxious and disagreeable gases and odors injurious and dangerous to the health and lives of the inhabitants of said city, more especially to those in the north portion thereof, and rendering that portion of the city an unhealthy and unsafe place to live.

That said sewage and the place where the same is discharged, to-wit, the old river bed, adjoining or near said city on the north, is a public nuisance, to-wit, a nuisance to several hundred of the inhabitants of the north part of said city, that the said city has maintained, now maintains, threat-

⁴ Sustained against demurrer in *Markwardt v. Guthrie*, 18 Okla. 32, 34.

ens to maintain and will maintain said nuisance unless restrained.⁵

631. ALLEGATIONS IN ACTION AGAINST A DRAINAGE DISTRICT FOR DAMAGES CAUSED BY FLOODING OF PLAINTIFF'S LANDS.

Plaintiff states that said drain or ditch was dug and constructed during the year 19. ., by defendant. That defend-

⁵ Form in *State v. Concordia*, 78 Kan. 250.

Nuisance defined and statutory provisions relating thereto. *Comp. Laws Okla.* 1909, sec. 4751 et seq.; *Gen. Laws Kan.* 1909, secs. 2733, 4387, 7968.

In an action for the prevention of a public nuisance, the petition must show that the relators have suffered some special or peculiar injury shared by the public alike, in order to sustain the action. *United States ex rel. v. Choctaw, O. & G. Rd. Co.*, 3 Okla. 404.

A burial ground is not per se a nuisance, and in order to obtain an order restraining the continuance of it the plaintiff must state facts from which the court can clearly see that it is injurious to the health of persons living near it. *Clinton Cemetery Assn. v. McAttee*, 27 Okla. 160.

A petition for an injunction to remove or abate a public nuisance, will not be sustained unless it clearly shows that the plaintiff does or will sustain a special damage—a personal injury distinct from that which he suffers in common with the rest of the public. *Shed v. Hawthorne*, 3 Neb. 179.

In an action prosecuted by the county attorney under section 2533 of the *Gen. Stat. of 1889 of Kan.* to enjoin the maintenance of a nuisance, the addition to the words "The State of Kansas" in the title of the action, of the words "ex rel. R. T. H., county attorney of B. county," although unnecessary, does not prejudice the rights of the defendant, nor render the petition demurrable. *Pottenger v. State*, 54 Kan. 312.

Where a school district brings an action to abate a public nuisance, it must show that it has sustained damages peculiar to itself; it is not enough that such damages are greater than those sustained by the public at large, differing from them only in degree—they must be different in kind. A public nuisance can only be redressed by a public prosecution unless the party complaining suffers some peculiar damages differing in kind from those sustained by the public at large. *School District v. Neil*, 36 Kan. 617.

An action cannot be maintained by a private person for an interference with or an obstruction in a public highway constituting a public nuisance, unless he is thereby specially injured in some way not common to the public at large. *McKay v. City of Enid*, 26 Okla. 275.

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ant still owns, maintains and operates said drain or ditch. That said drain or ditch, through and across plaintiff's land, is about feet deep and about feet wide at the top and divides plaintiff's land into two tracts. That by reason of the improper location and unskillful construction of said ditch, the channel or bed of the N. river where it passes through the lands of the plaintiff above described, has been so dammed up as to form a stagnant pool of water, of the full width of said channel and for a distance of miles in length. That water stands therein during the entire year and having no current becomes and is foul and noisome, and by reason of the accumulation of stagnant water in said river channel, foul and noisome vapors arise therefrom and the atmosphere in and about said channel and about the residence on said premises has become and is poisoned and is thereby rendered unwholesome and unhealthy. That by reason of the improper location and unskillful construction of said ditch foul water is caused to accumulate in the plaintiff's cellar and to render same unfit for use, and foul water is caused to penetrate into plaintiff's well and to render the water thereof unwholesome and unfit for use. That by reason of the location and construction of said ditch as aforesaid, and the damming up of the channel of said river as aforesaid, water overflows and accumulates upon the pasture lands of the plaintiff, and causes the soil thereof to become and remain wet and injures the grass and timber growing and standing thereon.

632. ALLEGATIONS IN ACTION AGAINST A RAILROAD FOR CHANGING COURSE OF STREAM BY EMBANKMENT, FLOODING PLAINTIFFS' PROPERTY AND WASHING GULLIES AND TRENCHES THEREIN. (ONE COUNT OF PETITION.)

Plaintiffs state that they are now and were, at the date of the grievances hereinafter complained of, owners in fee

Form of petition in action for damages for alleged nuisance in the maintenance of a mill dam so as to damage plaintiff. *Hardesty v. Ball*, 43 Kan. 151.

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and in possession of the following described real estate, to-wit, (describe).

That many years ago the defendant company built its railroad embankment and cut or excavated a ditch or canal by the side of said embankment through plaintiffs' said tract of land for the distance of some hundred feet, completely damming up and changing the original channel of said S. river from its original course and channel for a long distance.

Plaintiffs state that the said defendant, its agents, servants and employees, did not construct, erect and maintain the embankment and canal or ditch in a scientific, skillful, careful and prudent manner, as it was their duty to do, but on the contrary, did construct the same in an unskillful, careless and neglectful manner and still uses the same so constructed, notwithstanding its condition, owing to its construction in such unskillful, careless and negligent manner, from said date to the time of bringing this suit. That said embankment completely dammed up said S. river, turning the original channel into said canal or ditch almost at right angles with the original stream and in consequence of the size of the canal, which was constructed too small to have sufficient outlet to pass the accumulated waters through it in time of heavy rains and freshets in said river, thereby causing said river to back up and overflow plaintiffs' said lands and farm on the side thereof next to said river; and thus causing said river to wash deep gullies and trenches through plaintiffs' farm on said tract of land and thus destroy the same on the west side thereof. That said defendant so constructed said canal as to cause the waters of said river at all times to flow directly against a large body of plaintiffs' said farm, thus wearing away the bank of the river that formerly protected that portion of plaintiffs' said farm and causing the river to overflow the same and wash large and deep gullies and trenches through that portion of plaintiffs' said farm on the said side thereof and to destroy said portion of plaintiffs' said farm on the said east side thereof.

That the defendant company did not at the time of con-

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structing said embankment and canal or ditch, or at any time thereafter, nor has it up to this date, in any manner, protected or attempted to protect the bank of plaintiffs' said lands and fields against overflows and abrasions of the banks thereof, either by levees, embankments or by riprapping the same, but, on the contrary, willfully, negligently and carelessly allowed and permitted said S. river to overflow and wash the same away as aforesaid, thereby destroying the same, and plaintiffs say that said injury and damages in the manner aforesaid were occasioned by the wrongful, unskillful, careless and negligent conduct and acts of defendant, its servants and agents, in and about the changing of the course of said stream by the means aforesaid and by the failure of said defendant in any manner to protect plaintiffs' said lands and fields from overflow and wash by said river as aforesaid.

633. ALLEGATIONS IN ACTION FOR DAMAGES TO GROWING CORN ALLEGED TO HAVE BEEN CAUSED BY THE ESCAPE OF GASES FROM A BRICK KILN.

Plaintiffs further say that the defendant ever since, 19. ., until the present time, has kept and maintained a large number of fires and furnaces burning in its said brick kilns and drying houses, and that said fires and furnaces have constantly and continuously, both day and night, produced, generated and emitted large quantities of smoke, noisome and noxious vapors and sulphurous fumes, poisonous to vegetation. And plaintiffs say that the defendant has during all said time carelessly and negligently, and unlawfully permitted said smoke, vapors and fumes to escape from its said fires and furnaces, and has carelessly, negligently and unlawfully, permitted said smoke, fumes and vapors to escape close to the surface of the earth, and has negligently, carelessly and unlawfully failed and refused to build chimneys or smokestacks to carry the same up into the air high enough to pass away without injuring plaintiffs' said crop, and has carelessly, negligently and unlawfully, during all of said time, fed its said fires and furnaces with soft or bituminous coal as fuel, which coal was highly charged with sulphur, sul-

phurous compounds and black jack, and which coal produced and generated when burned, smoke and vapors and fumes most poisonous and deadly to vegetation, all of which was well known to defendant, its officers, agents and servants. And that the defendant constructed its said furnaces in and about its said brick kilns and drying houses in such a careless, reckless and improper manner that the same did not properly consume the coal fed to them as fuel, but caused and permitted large quantities of said coal to smolder and generate large quantities of poisonous smoke and fumes that would not have been generated provided said furnaces had been properly constructed and had smokestacks connected therewith sufficiently high to cause the said furnaces to draw; and that the defendant by and through itself, its officers, agents and servants, during all of said time, fired, fed and maintained its said fires and furnaces in such a reckless and careless manner with the coal aforesaid that the said fires and furnaces were constantly kept clogged and overcharged with the said coal, and that by reason thereof the said fires and furnaces could not and did not draw properly, which caused said fuel to smolder and generate and emit large quantities of such smoke, vapors and fumes which escaped from the mouths of furnaces and was not sufficiently heated and rarified to raise above the surface of the ground. That by reason of the premises aforesaid the said poisoned and noxious smoke and vapors and poisonous and sulphurous fumes so caused, generated and produced by the defendant as aforesaid, did from time to time and for days at a time, during the entire growing season of vegetation of the present year, drift and pass over and enter into and spread and diffuse themselves over and upon, into, through and about plaintiffs' said corn so growing as aforesaid on the said land owned and occupied by plaintiffs as aforesaid, and plaintiffs' said cornfield and the air over, through and about the corn growing in said field was thereby greatly filled and impregnated with said smoke, vapors and fumes, and the said smoke, vapors and fumes so caused, generated, produced and permitted to escape by the defendant as aforesaid, and so passing and drifting

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into and among plaintiffs' said growing crop of corn as aforesaid, did kill, injure, poison and destroy all corn and corn plants so growing on ten acres of the land so owned and occupied by plaintiffs as aforesaid, so that plaintiffs' said corn crop on said ten acres of land is wholly worthless.

634. ALLEGATIONS WHERE NUISANCE WAS ERECTED BY DEFENDANT'S PREDECESSOR—KNOWLEDGE OF EXISTENCE.

Plaintiff states that the defendant is a corporation duly created by law for railroad purposes; that on or about the day of, 19.., the plaintiff became the owner in fee of the (describe property) and plaintiff has continued to own said half lot to this day.

Plaintiff states that he erected on said premises immediately and prior to any of the grievances hereinafter mentioned, a house and other improvements for the use of himself and family as a residence and for business purposes, and prior to the grievances hereinafter mentioned said premises were of easy access from said street, and the plaintiff had the right to use and enjoy the same without let or hindrance.

That on or about the day of, 19.., the M. K. & T. Ry. Co., a corporation duly created by law, having authority to construct its road in said street in a lawful manner, and not so as to obstruct the use of said street, yet wrongfully, carelessly, negligently, and in violation of plaintiff's rights, did construct in said street and immediately alongside of plaintiff's aforesaid premises, an embankment of earth varying in height from inches to feet, and did place thereon cross-ties and rails of its line of railroad: and the said construction of said embankment and the placing thereon said cross-ties and rails did obstruct the use of said street by plaintiff, which use he was entitled to by law, and did entirely shut off plaintiff's way of ingress to and egress from said premises over said street.

And afterwards, to-wit: about the day of, 19.., the said M. K. & T. Ry. Co., put into the possession and control of the defendant, the said line of railroad in said street, with full power and authority to continue said obstruc-

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tion, and since the taking of said line of railroad by defendant as aforesaid, the defendant with knowledge of the existence of said obstruction has wrongfully, unjustly, and in violation of the plaintiff's rights, maintained, continued and kept up said embankment and other obstructions, and has thereby continued to obstruct the use of said street by plaintiff, which use he was and is entitled to by law, and has continued to shut off plaintiff's way of ingress to and egress from his said premises.

Wherefore plaintiff has sustained damage at the hands of the defendant in the sum of dollars.

CHAPTER XLVIII.

PARTITION.

- 635.** Action for partition of real estate, praying for order of sale.
636. Same—Another form.
637. Action for partition by the heirs of the wife who held the title at the time of her death.
638. Action for the partition of certain lands and to determine the shares of heirs.

635. ACTION FOR PARTITION OF REAL ESTATE, PRAYING FOR ORDER OF SALE.

Plaintiff states that he was married to M. B. on
....., 19..; that she died on, 19.., testate,
but without any child or other descendants being capable of
inheriting; that at the time of plaintiff's marriage with his
wife, she was the widow of C. B., deceased, and that no issue
was born of said marriage with said C. B. or the subsequent
marriage with plaintiff; that by the will of plaintiff's wife
dated, 19.., and duly probated on
....., 19.., she undertook to devise all the real estate in
controversy to defendants as tenants in common; that as
widower of his deceased wife he is entitled to one-half of said
property, absolutely, subject only to the payment of her debts,
and that defendants as devisees under the will only acquired
the other half thereof.

Plaintiff further states that the property in controversy on
..... .., 19.., was conveyed to the defendant M. H. in
trust, however, for the sole and separate use of plaintiff's
deceased wife, then the wife of said C. B. (describe property
and set out names, rights, interest and title of parties in-
terested).

Wherefore plaintiff prays that the interest of the parties
hereto may be adjudged and determined and partition made
and decreed according to their respective interests, and that

as it is manifest from the nature and character of the land and the interests of the parties, that partition in kind can not be made without great prejudice to the owners, the land be ordered sold and that the proceeds be divided among the parties according to their respective interests.

636. SAME—ANOTHER FORM.

Plaintiff states that plaintiff and defendants are the owners and hold in joint tenancy the remainder after the expiration of the estate during the natural life of C. of the following lands in county, ..., to-wit: (describe).

That the rights of all persons in said real estate are as follows, to-wit: (here state).

Plaintiff states that he knows of no other person or persons holding or claiming any interest in said remainder in said real estate and that the rights of all the parties therein are hereby correctly stated.

That the amount and situation of said real estate and the number and parties interested therein are such that division thereof in kind cannot be made without great injury to the interests of the owners thereof.

Plaintiff asks that partition and division of said remainder of said lands be made among the parties thereto entitled. That the interests of the parties be decreed as herein set forth and that the land be sold for the purpose of partition and division as aforesaid and for such other and further relief as may seem just.

637. ACTION FOR PARTITION BY THE HEIRS OF THE WIFE WHO HELD THE TITLE AT THE TIME OF HER DEATH.

Plaintiff states: That M. S., formerly a resident of M., M. county, Kansas, and now deceased, on or about the day of, 19.., died intestate in the city of M. and left surviving her her husband, the defendant, and her grandchildren; the said grandchildren being the only children of A. A. K., daughter of said M. S. That at the time of her decease the said M. S. was the owner in fee simple of the following described real estate (here describe property).

That plaintiff alleges further that by reason of the prem-

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ises the plaintiff is the owner in fee simple of an undivided one-fourteenth interest in said real estate; that the said defendants are each the owner of an undivided one-fourteenth interest in said real estate; that the said defendant owns an undivided one-half interest in said real estate; that the said real estate is capable of partition and that the plaintiff and the said defendants are entitled to a decree declaring the interest of each in and to said real estate and making partition thereof.

For second cause of action plaintiff alleges that the plaintiff and six others each own an undivided one-fourteenth interest in the real estate described in the first count of this petition, to-wit: (here describe).

That the said defendant owns an undivided one-half thereof and that the said defendant unlawfully keeps the plaintiff and the said defendants (6) out of the possession of their undivided interest in said real estate; that the said defendant, has so kept the plaintiff and the other defendants out of the possession of said real estate since the day of, 19... That the reasonable rental value of plaintiff's undivided interest in and to said real estate is \$. per month and that by reason of the premises the plaintiff is entitled to judgment for the recovery of her interest in said real estate from said defendant, and that the other defendants are entitled to a like judgment for the recovery of their interest in and to said real estate and also for the use of said real estate in the sum of \$.

Wherefore, the said plaintiff prays for judgment against the said defendant for the recovery of her interest in said real estate and for the value of the rents and profits thereof, and further, the plaintiff prays that the respective interests of the plaintiff and the said defendants may be determined and that an order be made specifying such interest and directing a partition of said real estate to be made accordingly; that commissioners be appointed and that such proceedings be had as by the statute is provided in such cases; that plaintiff have such other and further relief in the premises as is equitable and just, and also have judgment for costs.¹

¹ From form in record in *Oliver v. Sample*, 72 Kan. 582.

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638. ACTION FOR THE PARTITION OF CERTAIN LANDS, AND TO DETERMINE THE SHARES OF HEIRS.

The plaintiffs allege that on the day of, 19..., C. E. S., a resident of the county of R., Nebraska, died leaving surviving him, F. S., his widow, and the following named children his sole heirs at law, to-wit, (name children), at the time of his death C. E. S. was seized in fee of the following real estate situated in said county of R. (describe property); he left a last will and testament which was duly admitted to probate in the county court of said county of R. on the day of, 19..., whereby he devised and bequeathed to F. S., his widow, all his property, including the land above described, for and during her lifetime only, but he made no disposition by will of the said land after the death of the said F.; afterwards on , 19..., the said F. S. died, being then a resident of the said county of R. afterwards, to-wit, on the day of, 19..., the said E. F. died intestate, leaving the following children, her sole heirs at law (name children), who inherited the interest of their mother in said land. The said L. R., L. S. and E. S. sold and conveyed by deed of conveyance an undivided one-half of their right, title, interest and estate in the said land to F. M. on the day of, 19...; the said L. W., A. H., L. S. and C. S. sold and conveyed by deed of conveyance to P. S. all their right, title, interest and estate in or to the said land. The said P. S. is now the owner in fee of an undivided five-eighths of the said land and he has been in possession and occupation of the whole of said land since the death of the said F. S. and has received and converted to his own use the rents and profits thereof for the years and, which were worth \$. for each of said years. He further claims that he is the owner of the whole of said land since the death of his mother, and wrongfully keeps plaintiffs out of the possession of their interest therein.

A. M. is the owner of an undivided one-eighth of said land (set out the interest of the heirs).

Plaintiffs herein have a legal estate in the said land to the extent above set forth, and are entitled to the immediate pos-

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session of the same, and they have been so entitled to such possession ever since the death of Mrs. F. S., which took place , 19.., and ever since that time they have been wrongfully excluded from such possession by the said P. S.

Plaintiffs therefore pray that judgment be rendered confirming the shares of the parties as above set forth, and for a partition of said land according to the respective rights of the parties interested therein or if the same cannot be equitably divided that the said land be sold and the proceeds thereof be divided. That in making said partition the said P. S. be charged with \$. as the rents and profits of the land for the years and, which he has received and appropriated to his own use, and that said sum also be divided and partitioned.

That plaintiff may have such other and further relief as equity may require.²

² From form in record in *Schimpf v. Rhodewald*, 62 Neb. 105.

Contents of petition. Cob. Ann. Stat. Neb. 1911, sec. 1750; Comp. Laws, Okla. 1909, sec. 6135; Gen. Stat. Kan. 1909, secs. 6230, 6231.

A petition for partition, the allegations of which bring the case within the reason of the statute by setting forth the conveyances from which the several interests of the parties appear, is not demurrable because it fails to allege in terms the respective interests of the owners. *Johnson v. Brown*, 74 Kan. 346.

A party out of possession of real estate, whose title is denied, cannot maintain an action of partition against one in possession, claiming title to said land. *McMurtry v. Keifner*, 36 Neb. 522; *Seymour v. Ricketts*, 21 Neb. 240.

A joint tenant or tenant in common out of possession cannot maintain a suit for partition against his cotenants who hold adversely to him, without joining with the demand for partition a cause of action for possession of the land. *Moorehead v. Robinson*, 68 Kan. 534; *Denton v. Fyfe*, 65 Kan. 1; *Chandler v. Richardson*, 65 Kan. 152.

The owner of a life-interest in lands cannot maintain an action of partition against the owners of the estate in remainder. *Love v. Blauw*, 61 Kan. 496.

An action by a tenant in common to have his undivided share set apart to him is in effect an action in partition, and may not be maintained unless the tenant in common is entitled to the present possession of such share. *Mathews v. Glockel*, 82 Neb. 207.

A cotenant of personal property has a right to have the same

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partitioned and the exercise of this right is not subject to the control of another cotenant. *Julian v. Yeoman*, 25 Okla. 448.

A petition in a suit for the partition of property other than real estate will be deemed insufficient unless it contains averments which show the condition of the property to be such that equitable intervention is necessary to preserve the property or to protect the interest of the owners. *Beardsley v. Gas Co.*, 78 Kan. 571.

Where, in an action which, under the petition, is for partition only, the sole litigated question relates to plaintiff's title to the land sought to be partitioned, the action is in essence one in ejectment, and the defeated party is entitled to a second trial as of right, upon proper demand. *McNulty v. Exchange Bank of Stockton*, 69 Kan. 51.

Where, by the terms of a will, certain real estate was devised to trustees, to be by them sold and the proceeds divided, such trustees may maintain an action for the partition of such real estate, the will having vested them with title. *Noecker v. Noecker*, 66 Kan. 347.

Where the petition in a suit for partition shows the defendant to be in the exclusive occupancy of the premises involved, the court of the county to which the case is transferred on change of venue may permit it to be amended so as to state also a cause of action in ejectment. *Young v. McWilliams*, 40 Kan. 243.

An amendment of a petition in partition alleging an ouster of the cotenants by a certain defendant does not change the nature of the action to ejectment so as to entitle the defeated party to a new trial as a matter of right. *Saville v. Saville*, 63 Kan. 861.

Under the Civil Code of Kansas the fact that the property is held adversely to the plaintiff will not defeat an action of partition when brought in connection with or as part of another action for the recovery of real property. The two causes of action may be united in one action, or they may, when so pleaded, and no objection is made, be tried as a single cause of action. *Howard v. Carter*, 71 Kan. 85; *Kennedy v. Haskell*, 67 Kan. 612.

Petition for partition filed while chap. 162 Comp. Laws of 1862 were in force. *Havens v. Drake*, 43 Kan. 484.

Form of petition in action for partition of certain real estate in which plaintiff claimed an interest. *Seymour v. Ricketts*, 21 Neb. 240.

Form of petition sustained against a general demurrer, although criticised by the court because it does not set forth the respective interests of the parties. *Johnson v. Brown*, 74 Kan. 346.

Allegations in action for partition of real estate. *Schick v. Whitcomb*, 68 Neb. 784.

CHAPTER XLIX.

PARTNERSHIP.

- 639. Action alleging breach of partnership agreement, and mismanagement of business, praying for dissolution and appointment of receiver.
 - 640. Action by one member of a partnership firm praying for an accounting and settlement of partnership affairs.
 - 641. Allegations in action by one partner to recover one-half of sum due firm after dissolution.
 - 642. Action for dissolution of partnership, praying for an accounting and the appointment of a receiver to take charge of the assets.
 - 643. Action in equity asking for the dissolution and settlement of partnership.
- 639. ACTION ALLEGING BREACH OF PARTNERSHIP AGREEMENT, AND MISMANAGEMENT OF BUSINESS, PRAYING FOR DISSOLUTION AND APPOINTMENT OF RECEIVER.**

Plaintiffs for cause of action against the said defendants allege:

That heretofore and on the day of, 19..., the said plaintiffs and the said defendants by the names mentioned therein, entered into a contract in writing, a copy of which is hereto attached and made a part of this petition, that is to say: (here insert contract).

And said plaintiffs further allege, that pursuant to the terms and stipulations mentioned in said agreement, said parties entered into the business contemplated thereby as a co-partnership, and under the actual management and control of the said defendants, and which said business has been conducted as aforesaid from the said day of until the day of, 19...

And said plaintiffs further allege that all the things required by them to be done by the terms of said contract they have done; and the money required thereby to be contributed by them, they have contributed, including the sum of \$. each the net value of the interest of each of said plaintiffs in

the co-partnership of the H. S. and F. Co., which by agreement of all of said parties became merged into the co-partnership formed by said contract first herein mentioned, and became a part thereof.

And said plaintiffs further allege, that the management and conduct of said business by the said defendants has been unbusinesslike, wasteful and ruinous; that the report of said business by the defendants themselves shows a loss of \$. for the first year of said business; the liabilities of said co-partnership have been increased from \$. at the time of commencing business to the amount of more than \$. at the time of commencing this action, with no corresponding increase in the assets thereof; that the whole capital of said co-partnership has been wasted and misapplied by said defendants and that the assets thereof are insufficient to meet its liabilities.

And said plaintiffs further allege that at the time of entering into said contract of co-partnership said defendants had not assets and property in said business of the value of \$. or any sum in excess of \$.; and that at the time of so entering into said contract, the said defendants represented that their property aforesaid was of the value and worth of the former sum, and by such representations, which the said plaintiffs believed, they thereby were induced to enter into said contract, which without such representations, they would not have done.

And said plaintiffs further allege that the said defendants never contributed to said co-partnership a sum in excess of \$.

And said plaintiffs further allege that after the failure of said co-partnership, to-wit, after the bringing of this suit, they for the first time learned and discovered that in making up of said sum or alleged sum of \$. the said defendants included therein items aggregating \$. or thereabouts for alleged expenses of themselves, which was not represented by any property whatsoever.

And said plaintiffs further allege, that on account of the mismanagement of said co-partnership business by said de-

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defendants, said co-partnership has not money to meet its liabilities, and no credit whereby to obtain money, and that the same is thereby in a hopeless condition.

And said plaintiffs further allege, that said defendants are lessening the assets of said co-partnership by the wasteful manner in which they are putting the raw material thereof into the manufactured product as also by the large discounts they are making on bills receivable, in order to stimulate collections thereof.

The said plaintiffs further allege, that notwithstanding the mutual agreement and understanding, which was entered into in the month of, 19.., that no further obligations should be incurred, except by and with the consent of all said co-partners, yet the defendants have ignored the same and have increased, and continue to increase, said obligations.

And said plaintiffs further allege that by reason of the manner in which plaintiffs were induced to enter into said contract as before alleged, as also on account of the manner in which said defendants have conducted said business, the said plaintiffs have lost confidence in their capacity and integrity and the further continuance with them in the business aforesaid is impossible.

Wherefore the said plaintiffs pray a dissolution of said co-partnership and an accounting between said partners; that a receiver be appointed to take possession of said partnership property, including the books of account and bills receivable thereof, and to dispose of the property aforesaid as he may be directed by subsequent orders of said court; and that a restraining order issue out of and from the said court, restraining said defendants and each of them from in any manner intermeddling with said property, borrowing money in the name of said co-partnership, selling or attempting to sell and to dispose of any of its property; or collecting or attempting to collect any of its claims or bills receivable.

And said plaintiffs further pray for an order addressed to the sheriff of said county, commanding him forthwith to take possession of said property, and hold possession thereof until said receiver may be appointed and qualified, and for such

other further and different relief as to the court shall seem just and equitable.¹

**640. ACTION BY ONE MEMBER OF A PARTNERSHIP FIRM
PRAYING FOR AN ACCOUNTING AND SETTLEMENT OF
PARTNERSHIP AFFAIRS.**

E. W. H., the plaintiff above named, complains of H. N. H., B. J. C. and J. C. C., the defendants above named, and says:

That on or about the day of, 19.., the plaintiff, E. W. H., made and entered into a contract with said H. N. H., B. J. C. and J. C. C., which contract was oral and by the terms of which contract all of said parties, E. W. H., H. N. H., B. J. C. and J. C. C., agreed to enter into and form a partnership contract under the name and style of "C. & C." for the purpose of commencing, performing and completing and carrying into effect a contract, before that time made, and at that time, in full force and effect, but wholly unperformed, between said B. J. C. and J. C. C., co-partners under the name and style of C. & C., with the village of K. C., in the State of Oklahoma, to furnish extensions to the water works pipes and hydrants of said village of K. C. for and at the rate of dollars per foot for all such extensions from and to the water works pipes and hydrants complete. To be paid for by said village of K. C. in warrants drawn by the city clerk of said village of K. C. and countersigned by the chairman of the board of trustees of said village of K. C., upon the treasurer of said village of K. C., and by the terms of said contract it was mutually understood and agreed between all of said parties to this action that said B. J. C. and J. C. C. were to furnish all the money necessary to pay the expenses for carrying out and complying with all the terms of said contract with said village of K. C. and to pay for all necessary labor and material required in complying with said contract and that the said E. W. H. and H. N. H. were to, and would, manage and oversee the construction of all said work, including said contract, and that upon a settlement with said K. C. and upon payment by said village or its successor, or legal

¹ From form in record in *Clark v. Hall*, 54 Neb. 479.

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representative, of the amount due upon said contract, the profit made upon said contract after deducting the entire amount paid out by said B. J. C. and J. C. C., for said material and labor, should be equally divided between all said parties to this action; that is that said H. should have one-fourth of said profits, said C. & C. should receive one-half of said profits and said plaintiff should receive one-fourth of said profits.

That all of said parties faithfully complied with and performed their part of said contract, with said village of K. C. and afterwards said village was incorporated as the city of K. by operation of law became liable for all said indebtedness of said village of K. C. heretofore mentioned.

That afterwards and in, 19.., it was agreed by and between said plaintiff and all of said defendants and said city of K., that the parties plaintiff and B. J. C., H. N. H. and J. C. C., to this action would accept the bonds of said city of K. to the amount of \$. in full settlement of the claim of all the parties to the action against said city of K. under said contract (that the total amount of said claim at the time was \$.), to all of which city of K. agreed and afterwards and on the day of, 19.., said city of K. duly and lawfully issued its bonds to the amount of and in the sum of dollars for the purpose of complying with and performing in full said contract between all of said parties and said city of K., and said bonds were sold for the sum of dollars net in full of and above all discounts to and expenses, and the plaintiff says that said defendants and all of them converted said proceeds of said bonds to their own use and benefit. That the total expenses for complying and carrying out the terms of said contract and for furnishing the necessary material aggregated the sum of \$. That said expenses were paid by B. J. C. and J. C. C. and the profits remaining after deducting all said expenses amounted to \$., and the said defendants converted all of said profits to their own use, including plaintiff's share of said profits, amounting to \$., and that plaintiff is entitled to and ought to recover from said defendants the sum of dol-

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lars as his share of said profits over and above all expenses, and plaintiff says that afterwards and at the request of all of said parties the plaintiff placed and laid down additional service pipes for said defendants of the value of dollars, for all of which plaintiff has received no pay. That though often requested the said defendants have failed and refused to settle with plaintiff and that there is yet due to plaintiff from defendants the sum of dollars.

Whereupon this plaintiff prays for an accounting between said plaintiff and defendants and for judgment against said defendants for said sum of \$. and the costs of action and such other and further relief as may in law and equity be just.²

641. ALLEGATIONS IN ACTION BY ONE PARTNER TO RECOVER ONE-HALF OF SUM DUE FIRM AFTER DISSOLUTION.

Plaintiff states that on the day of, 19.., plaintiff and defendant were partners in buying and selling ready made clothing, etc., in the town of, in county; that by the terms of the partnership they were equal owners of all the assets and profits of said business; that on the said day of, 19.., by written agreement executed by the parties, said partnership was dissolved; that for the consideration of dollars plaintiff sold and conveyed to defendant all of plaintiff's right, title and interest in the store occupied by said firm, with all notes and accounts due said firm; and it was further agreed that the defendant should pay all of the debts and claims against said firm; that at the time of the dissolution of the partnership there was on deposit to the credit of said firm, in a banking house named, the sum of dollars, it being a part of the assets of said firm; that one-half of said sum belonged to the plaintiff; that upon the dissolution of said partnership as aforesaid, defendant wrongfully took possession of said sum and refuses to pay to plaintiff one-half thereof or any part thereof.

² From form in Conley v. Horner, 10 Okla. 277.

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642. ACTION FOR DISSOLUTION OF PARTNERSHIP, PRAYING FOR AN ACCOUNTING AND THE APPOINTMENT OF A RECEIVER TO TAKE CHARGE OF THE ASSETS.

Plaintiff states that on the day of, 19.., plaintiff and defendant entered into a partnership agreement for the purpose of carrying on and conducting the business of buying and selling ready made clothing under the firm name of D. & B. C. Co., in the city of S., State of; that by the terms of the partnership agreement the said plaintiff and defendant were equal owners of all the assets and profits of said business and that they were to share equally in the losses sustained, if any; that immediately upon the execution of said articles of partnership the plaintiff and defendant entered upon the business of general merchandise, buying and selling ready made clothing and have since carried on said business under and in pursuance of said agreement.

Plaintiff states that since the beginning of said partnership and while plaintiff and defendant were conducting said business under the firm name of D. & B. C. Co., the defendant has at divers time appropriated to his own use from the receipts of said business certain sums of money belonging to the business of said firm, said sums being greatly in excess of the amount to which defendant was entitled and that defendant has concealed this practice from the plaintiff. That by reason of said action of the defendant in appropriating said funds to his own use the defendant has become greatly indebted to the partnership which indebtedness the plaintiff has requested the defendant to pay, but said defendant has refused to comply with said request and continued to appropriate the partnership moneys received by him to his own use, and that by reason of the misappropriation of the partnership moneys the defendant has greatly increased his indebtedness to the partnership and has thereby diminished his assets and the value of its property.

Plaintiff states that by reason of said misappropriation of funds the defendant has received the sum of dollars in excess of his proportionate share of the profits of the partnership and that he still continues to collect the moneys be-

longing to the partnership and appropriate the same to his own use.

Wherefore plaintiff prays for a judgment dissolving said partnership and for an accounting covering all the business transactions of said partnership; that defendant be enjoined from further interfering with or in any way controlling or handling any of the property of said partnership; that a receiver be appointed to take charge of all the assets, money and property belonging to said partnership; that all of said assets be sold and converted into money for the purpose of paying the liabilities of said partnership and all the costs connected with this proceeding, and the profits, if any, be divided between the plaintiff and defendant according to their interest in the same, and for such other and further relief as to the court may seem just and proper.

643. ACTION IN EQUITY ASKING FOR THE DISSOLUTION AND SETTLEMENT OF PARTNERSHIP.

The plaintiff, states that on the of, 19.., he formed a partnership with the defendant, ..., under the style of & Co., in the business of buying and selling merchandise in the city of L. R. By the terms of the partnership, each was to put in an equal amount of capital and share equally in the profits, losses and labors of the business, and the firm was to continue years, unless sooner dissolved by consent. The partnership was continued since said date, during which time the firm has done a large business. Since the commencement of the partnership the defendant has formed habits of intemperance, which wholly disqualify him as a manager or partner of a mercantile concern. These habits are now confirmed, and render the continuance of the connection hazardous to the plaintiff; yet the defendant will not consent to a dissolution and settlement of the firm.

Wherefore he prays judgment for the dissolution of the partnership, for the settlement of the business and accounts of the firm, for the division of the assets that may remain after the payment of the firm debts, and for other proper relief.

A partner may sue his copartner at law where the cause of action

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is not connected with the partnership accounts, and their consideration is not involved. *Halleck v. Streeter*, 52 Neb. 827.

One partner cannot maintain an action at law against his copartner to recover moneys alleged to be due him on account of partnership transactions, where no settlement of the partnership accounts and business has been had. *Lord v. Peaks*, 41 Neb. 891.

An action may be maintained against H. L. S. and G. W. S., partners doing business as S & S., or against either of them; but to render G. W. S. liable for the acts of H. L. S. there should be averments as well as evidence to establish between them the relation of partners. *Stone v. Neeley*, 42 Neb. 567.

Petition by one partner against another after the termination of the partnership held sufficient. *Carlin v. Donegan*, 15 Kan. 375.

Where a petition alleges in general terms that two persons are liable for the price of goods purchased by them, and the answer of one is a general denial, without any attack upon the petition that the facts as to the joint liability were not fully and definitely stated, the admission of proof showing that the joint liability arose through a partnership of the parties is not material error. *Howard v. Woodward & Co.*, 52 Kan. 106.

Under a complaint alleging that plaintiff sold goods to defendant, proof that he sold them to a firm of which defendant was a partner is not a material variance, where defendant, in his answer, admits the partnership. *Crane v. Ring*, 48 Kan. 61.

A petition is not subject to demurrer because it does not allege that the plaintiff partnership has complied with the law by filing the certificate and making the publication required by the statutes of Oklahoma. *Swope & Son v. Burnham, etc. & Co.*, 6 Okla. 736.

Suit in partnership name. To authorize a copartnership to maintain an action in the partnership name in Nebraska, it is necessary for it to set forth in the pleadings in some manner that it was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state. *McJunkin v. Placek & Fitl*, 80 Neb. 373; *Church v. Callihan*, 49 Neb. 542.

In an action under section 27, Code of Civil Procedure of Nebraska, to charge the property of an individual member of a firm with the payment of a judgment against it, an entry of appearance by the firm, whereby jurisdiction was conferred to render such judgment, and the failure to interpose the statute of limitations as a defense, conclude the individual as to the binding force of such judgment with respect to the objection indicated. *Winters v. Means*, 50 Neb. 209.

Form of petition in action against the surviving partner for a debt contracted by the partnership. *Banks v. Steele*, 27 Neb. 138.

Form of petition on alleged contract of partnership asking for an accounting of profits. *Osborne v. Fitzgerald*, 26 Neb. 514.

CHAPTER L.

PHYSICIAN AND PATIENT.

- 644. Action against a physician for malpractice, alleging negligence in failing to discover a dislocation and fracture.
- 645. Action against a physician for alleged negligent treatment of a compound fracture of the bone.
- 646. Action against a dentist for damages for injuries caused by using instruments which were unclean.
- 647. Action for damages alleged to have been caused by malpractice.
- 648. Allegation of negligence in a petition for damages for malpractice of physician.
- 649. Petition for damages by seven-year-old girl against osteopathic physician for alleged malpractice in treating hip.

644. ACTION AGAINST A PHYSICIAN FOR MALPRACTICE, ALLEGING NEGLIGENCE IN FAILING TO DISCOVER A DISLOCATION AND FRACTURE.

Plaintiff states: That the said defendant on and prior to the day of, 19.., was and held himself out to be a physician and surgeon, and was then and there practicing medicine and surgery at the town of B., in C. county, Kansas: that said defendant on said day and prior thereto represented and held himself out as possessing the ordinary skill of surgeons in his locality: that on or about the day of, 19.., plaintiff was severely injured, resulting in a dislocation of her right shoulder and arm and a dislocation of her left elbow; that this plaintiff knowing that the defendant held himself out and represented himself that he was a physician and surgeon of ordinary skill and ability, sent for him and employed him as such physician and surgeon to treat, care for and cure her injuries aforesaid: and thereupon the said defendant called upon this plaintiff as such physician and surgeon and then and there undertook to use and employ proper skill and care in and about the discovery of her injuries and the nature

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thereof, and then and there represented that he had sufficient skill and ability to discover the nature and character of her injuries and to treat the same, and did undertake to treat said injuries and to employ proper and ordinary skill, ability and care in and about the treatment of the same; but plaintiff avers that notwithstanding the representations of the said defendant, that he possessed ordinary skill and ability, and that he would employ proper and ordinary care in and about the discovery and treatment of her said injuries: and although this defendant pretended to make an examination of this plaintiff and pretended that he was treating her injuries properly, failed and neglected to discover the said dislocation of her right arm and shoulder, and failed and neglected to discover the dislocation of her said left elbow, and continued to treat this plaintiff for about two weeks during which time he failed and neglected to discover said dislocations, or either of them; that said dislocations were prominent, and easily discovered by a physician and surgeon of ordinary skill and ability, using ordinary care, and the said defendant, if he had possessed ordinary skill and ability and had exercised ordinary care and attention, could and would have discovered said injuries.

Plaintiff further states that the said defendant had charge of her case exclusively for more than two weeks and wholly failed and neglected to discover and treat said injuries, and that said injuries were not discovered until another physician and surgeon was called in who, on the first examination readily and easily discovered that said right arm and shoulder and said left elbow were dislocated.

Plaintiff further states that by reason of the want of ordinary skill and ability and by reason of the failure to exercise ordinary and proper care for the space of about two weeks, said dislocation became more difficult to manage and reduce and it became impossible by reason of said negligence and want of skill, to properly reduce said dislocations and properly treat and cure this plaintiff, by reason of which she is permanently injured and has permanently lost the use of her right arm and shoulder, and the free and proper use

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of her left arm and has suffered permanent and great bodily injury.

Plaintiff further states that by reason of the unskillful, careless and negligent treatment and by reason of the want of proper and ordinary skill and ability in the discovery of her said injuries, and treatment of the same, she was obliged to employ and did employ another physician and surgeon and was obliged to pay out for the services of said physician and surgeon in and about trying to reduce said dislocation and treating her injuries and performing extra services made necessary by want of ordinary skill and ability and care on the part of the said defendant, and that she has incurred expenses by reason of the employment of said second physician and surgeon in the sum of \$.....

And that by reason of the permanent injuries which she has sustained herein, and by reason of the great mental anguish and bodily suffering, she has been damaged in the sum of \$.....

Wherefore, she prays judgment against the said defendant for the sum of \$..... special damages herein received and for the further sum of \$..... for her permanent injuries, and for the costs of this action.¹

645. ACTION AGAINST A PHYSICIAN FOR ALLEGED NEGLECT TREATMENT OF A COMPOUND FRACTURE OF THE BONE.

The plaintiff complains of the defendant and for cause of action herein says:

1. That prior to the day of, 19.., this plaintiff was a man, twenty-six years of age, of sound body and in good health, a farmer by occupation, residing and carrying on his said business of farming in W. county, Nebraska.

2. On all the dates herein mentioned, the defendant has claimed to be a physician and surgeon and has been at all of said dates, engaged in practice as such physician and surgeon at the city of W., in said W. county, Nebraska, and

¹ From form in record in *Manser v. Collins*, 69 Kan. 290.

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on the said day of, and for a long time prior thereto had held himself out to this plaintiff and the public generally as being a person skilled in said profession and entirely competent to perform surgical operations, reduce fractures and render such services as are usually and generally performed by a physician and surgeon.

3. That on the day of, 19.., this plaintiff by accident, sustained a fracture of the bones of his right leg, between the knee and ankle, both bones thereof being broken.

Said accident occurred at the farm occupied by this plaintiff about four miles west of said city of W., in W. county, Nebraska. Immediately after the happening of said accident and on the same day, plaintiff employed defendant as such physician and surgeon to reduce said fracture and to perform such services in and about the treatment of plaintiff respecting said injury as were necessary and proper in that behalf.

Plaintiff alleges that it was the duty of said defendant, as such physician and surgeon to reduce said fracture by placing the bones in plaintiff's leg at the point where the same were broken in apposition and in a natural and proper position and by the use of suitable splints and bandages or both, secure and retain said bones in such position, so that the same might knit or adhere together naturally and in their proper position and the usefulness and strength of said bones and of plaintiff's limb be thereby restored.

Plaintiff further alleges that defendant did not place the bones of plaintiff's leg in apposition but carelessly and negligently, and without any reasonable cause or excuse therefor, permitted the tibia or shin-bone, in plaintiff's said leg to overlap; that is, the end of said bone below and immediately adjacent to the point of said fracture, was not placed upon and against the end of said bone at and immediately above said point of fracture in a natural and proper position but to the contrary thereof, said defendant carelessly and negligently permitted the end of said bone at and below the point of said fracture to lap upon and pass the said upper

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end thereof and between the said upper end thereof and the other bone in said portion of plaintiff's leg, known as the fibula, so that the broken ends of said tibia were not in contact with each other, and negligently and carelessly allowed said bones to remain in said improper condition and by means of splints and bandages carelessly and negligently bound up the bones and muscles of plaintiff's said leg in such improper and negligent condition.

Plaintiff further alleges that said defendant carelessly and negligently and wrongfully advised this plaintiff that said fracture had been properly reduced and relying thereon, plaintiff was induced to, and did, permit defendant to continue to treat said fractured limb for a period of fourteen weeks from and after the date of said accident.

That during all of said time, plaintiff suffered great pain from and on account of said fracture and the manner in which the same had been, and was, treated by said defendant, and did not, in any respect, recover from said injury.

That during all of said time, said defendant carelessly and negligently advised plaintiff that said fracture had been properly reduced and the bones of plaintiff's leg properly set and treated by said defendant: that plaintiff had no knowledge of the aforesaid careless and negligent failure of defendant to properly set the bones of his leg, and properly treat the aforesaid fracture, but relied wholly upon the statements of said defendant with respect to the same as hereinbefore set forth until about the day of, 19.., when plaintiff, becoming alarmed by reason of the fact that he had not in any respect recovered from said injury, procured himself to be removed to S. C., ..., and an examination of his leg to be made by a surgeon other than defendant.

That by reason of the aforesaid careless and negligent acts of defendant and the failure of defendant to properly set the bones of plaintiff's leg and properly treat said injury, it was necessary that plaintiff should, and plaintiff did, about , 19.., subject himself to a dangerous and painful surgical operation, in this: that the flesh

and muscles of defendant's leg at the point where said fracture occurred were, by a competent surgeon other than defendant, cut open so as to expose the tibia at the point where such fracture occurred, the broken ends of said bone cut off and placed in apposition with each other in the natural and proper manner.

That by reason of the aforesaid careless and negligent failure of defendant to properly set said bones and treat said injury, defendant's ankle became stiff and was in that condition at the time said surgical operation was performed about , 19.., and in the latter part of , 19.., by reason thereof, plaintiff was compelled to, and did, submit to a second operation respecting said ankle for the purpose of overcoming and preventing the continued stiffness and permanent loss of the use thereof.

That by reason of the aforesaid careless, negligent and wrongful acts of defendant, this plaintiff was confined to *his* bed for more than six months after the receiving of said injury, as hereinbefore set forth and has permanently, in a large measure, lost the use of his said right leg and especially the ankle thereof and has been, is and ever will be in a great measure, disabled and prevented from performing manual labor and carrying on the business of farming, in which he was engaged at the time of the happening of the grievances herein complained of.

That plaintiff has suffered great physical pain and been prevented from performing any labor of any kind since the happening of said injury and has been compelled to expend the sum of \$. in procuring medical attendance, nursing and medicines since , 19.., on account and by reason of the failure of defendant to carefully and properly set the bones of plaintiff's leg and the carelessness and negligence of defendant in the respects hereinbefore enumerated.

That if defendant had properly and carefully reduced said fracture and set the bones of plaintiff's leg, plaintiff would have wholly recovered from said injury in two or three months from the date thereof and been possessed of the unimpaired use of his right leg and ankle.

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That by reason of the aforesaid negligence and careless acts of defendant, plaintiff's right leg and ankle have been, and are, permanently impaired and injured and he has become and ever will be, a cripple therefrom and has heretofore sustained, does now and ever will suffer great pain, annoyance and inconvenience therefrom.

Plaintiff has sustained damages in the premises in the sum of dollars.

Wherefore plaintiff prays judgment against said defendant for said sum of dollars, besides costs of suit.²

646. ACTION AGAINST A DENTIST FOR DAMAGES FOR INJURIES CAUSED BY USING INSTRUMENTS WHICH WERE UNCLEAN.

Plaintiff states that on the day of, 19..., defendant was engaged in the practice of dentistry. Plaintiff, desiring to have a tooth extracted, applied to defendant to perform the operation in such manner as in the latter's judgment was proper and necessary. Plaintiff states that in performing the same defendant did not use reasonable care and skill but on the contrary, he negligently, carelessly and unskillfully used surgical and dental instruments which were in an unclean, poisonous and septic condition, and did thereby injure, bruise, puncture, poison and infect the flesh, tissues and membranes in plaintiff's mouth, throat, and in and about the angle of the right lower jaw; and, by means of poisonous and dangerous drugs and medicines employed by defendant and injected into plaintiff's flesh, did poison and infect his blood. At the time plaintiff was strong and robust, but immediately after the operation he became violently sick and suffered intense pain, and was wholly prostrated for many months.

Plaintiff states that his mouth, throat, face, lower jaw, and right ear, by reason of said injuries, became immediately diseased and impaired in their functions, and will remain permanently crippled and impaired in their natural uses; and plaintiff has become permanently injured in general health and capacity for work. That in trying to effect a

² From form in record in *Leisenring v. LaCroix*, 68 Neb. 803.

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cure for said disease and injuries, plaintiff suffered loss of the salivary glands on the right side of the mouth, throat, and neck, and loss of a portion of the right lower jaw-bone, leaving that member permanently crippled and susceptible of accidental fractures, and causing plaintiff to be permanently disfigured about the face, jaw and neck. Plaintiff was unable to perform his ordinary employment and business for five months, and paid out for services of physicians and surgeons, nurses and medicines, the sum of dollars, his total damage being the sum of dollars.

Wherefore, etc.³

647. ACTION FOR DAMAGES ALLEGED TO HAVE BEEN CAUSED BY MALPRACTICE.

Plaintiff states that she is a married woman, the wife of R. W., and that on the day of, 19.., by accident fell and dislocated her right shoulder; that at that time the defendant was engaged in the practice of medicine and surgery in M. county in this state and held himself out to the community in which he and plaintiff resided as skilled in his said profession; that on the day and date of the fall and injury aforesaid to plaintiff, plaintiff having confidence in the skill of defendant, employed said defendant for a reasonable compensation to be paid by plaintiff to him, to set and heal the dislocation or fracture so as aforesaid received by her, and defendant in his capacity undertook to treat her arm and shoulder for said injury and gave her and her husband explicit directions for caring for her said injury, which directions she followed in every particular, but plaintiff states that defendant so negligently and unskillfully conducted himself in and about treating said dislocation or fracture and in attempting to reduce the same and heal plaintiff's said injuries, that through and by reason of his negligence and unskillfulness, plaintiff's said arm and shoulder grew stiff, and she entirely lost the use of the same and through said negligence and unskillfulness she is left in a deformed condition to such an extent that her clothing worn in the usual manner will not hide the deformity.

³ Adapted from form in Roark v. Greeno, 61 Kan. 299.

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Plaintiff further states that by reason of the negligence and unskillfulness of defendant as aforesaid, she was made sick, and had to endure great pain and suffering for the period of six months, and was all that time unable to attend to her duties as the wife of R. W.; that she has entirely lost the use of her arm; that same is permanently deformed so she can not enter society without appearing in a deformed and crippled condition, which is apparent to the sight of every one, and by reason of such deformity plaintiff at all times suffers mortification of mind, and by reason of such negligence and unskillfulness of defendant, as aforesaid, she is wholly disabled from attending to her duties as the wife of R. W., and is permanently injured, lamed and disfigured. Plaintiff says by reason of the premises she has been damaged in the sum of dollars, for which, with interest from date of suit she prays judgment.

648. ALLEGATIONS OF NEGLIGENCE IN A PETITION FOR DAMAGES FOR MALPRACTICE OF PHYSICIAN.

Plaintiff states that the defendant so negligently, carelessly and unskillfully treated and managed said injury that the said fractured bones were not set and placed and caused to remain in their proper position.

649. PETITION FOR DAMAGES BY SEVEN-YEAR-OLD GIRL AGAINST OSTEOPATHIC PHYSICIAN FOR ALLEGED MALPRACTICE IN TREATING HIP.

Plaintiff states that prior to the day of, 19..., plaintiff was afflicted with a slight stiffness in her right hip, but that it was not sufficient to make her lame or to cause her pain or to materially interfere with locomotion; that at said date the defendant held himself out as the president of the A. T. S. Infirmary, at, and as a practicing osteopathic physician and surgeon, and as competent, qualified and able to treat and reduce fractured, dislocated bones, nerves, muscles, and blood vessels and to treat all such dislocations successfully and to reduce them osteopathically; that on said date defendant made an examination of plaintiff's hip and diagnosed her disease and pronounced it a partial dislocation

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of her right hip joint; that defendant assured plaintiff and her parents at that time that the reduction of said partial dislocation was a matter attended with no danger and readily and easily performed and that he, defendant, could reduce said partial dislocation without injury to plaintiff.

Plaintiff further states that in consideration of the sum of dollars paid by her to said infirmary the defendant undertook to treat plaintiff for said so-called partial dislocation of her hip; that the defendant represented and stated to plaintiff and her parents that he would treat the muscles and tendons about plaintiff's right hip osteopathically until they were sufficiently relaxed before he could reduce said so-called partial dislocation of plaintiff's right hip joint; that defendant from the date aforesaid did manipulate the muscles, tendons and blood vessels about plaintiff's right hip joint until about when he determined that the muscles and tendons about plaintiff's right hip were sufficiently relaxed and he then and there undertook to reduce the so-called partial dislocation of plaintiff's right hip.

Plaintiff further states that in attempting to reduce said partial dislocation of plaintiff's right hip joint the defendant negligently, carelessly and unskillfully took plaintiff by her right ankle with one of his hands and about the knee with the other and with force and violence negligently, unskillfully and carelessly forced plaintiff's right leg upwards, towards and against her body with such force and violence and so negligently, carelessly and unskillfully, that he gave to plaintiff's said right hip joint a complete, upward and backward dislocation. Plaintiff states that defendant did not reduce the so-called partial dislocation of her right hip, but on the contrary the defendant so carelessly, negligently and unskillfully treated and managed plaintiff's disease and injury to her right hip that he permanently dislocated the same and by defendant's careless, negligent and unskillful conduct in treating plaintiff's right hip not only permanently dislocated the same, but injured, stretched and tore the muscles, nerves, tendons and blood vessels connecting with plaintiff's right hip joint and as a result of defendant's said neg-

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ligent, careless and unskillful treatment the plaintiff was thrown into a violent fever which continued for a long space of time and she was made sore, sick and to suffer great anguish and pain.

That as a result of the careless, negligent and unskillful conduct and treatment of plaintiff's disease by defendant, her spine has become curved and her right leg rendered entirely useless and shorter than the other and is gradually perishing, thereby rendering her maimed and deformed for life and permanently injured and her general health greatly impaired.

Plaintiff further states that from until at the special instance and request of defendant she remained at the city of aforesaid taking osteopathic treatment under the direction of the defendant for her said hip and until defendant refused to longer treat her and discharged the plaintiff.

Wherefore, etc.⁴

⁴In an action by a physician against a patient for services the pleading must allege the qualification of the physician to practice medicine under the laws of Kansas at the time the services were performed. *Westbrook v. Nelson*, 64 Kan. 436.

CHAPTER LI.

PRINCIPAL AND AGENT.

- 650. Action by principal against agent for money alleged to have been fraudulently retained in a real estate transaction.
- 651. Allegations in action by agent against principal for commission on contract to sell real estate.
- 652. Action for commission by real estate broker.
- 653. Action by agent for commissions on orders taken.

650. ACTION BY PRINCIPAL AGAINST AGENT FOR MONEY ALLEGED TO HAVE BEEN FRAUDULENTLY RETAINED IN A REAL ESTATE TRANSACTION.

The plaintiffs say that they are husband and wife, and that in the month of, 19.., they were the owners, as their homestead, and in possession of the (describe property); that the defendants are partners doing business under the firm name and style of D. & J., and are engaged as land brokers, selling land for people on commission; that in said month of, 19.., the defendants solicited these plaintiffs to list their said land with said defendants for sale, and it was then and there agreed between these plaintiffs and the defendants that if the defendants succeeded in selling the land for the sum of dollars they should receive as full compensation for their services the sum of dollars but if they should sell the said land for dollars said defendants were to receive as full compensation for their services in making such sale the sum of dollars.

Plaintiffs further say that after said contract was made between these plaintiffs and the defendants, the defendants sold said land for these plaintiffs for the sum of \$....., and the defendants falsely and wrongfully and with the intent and purpose of cheating and wronging these plaintiffs, represented to these plaintiffs that they had sold said land for only \$....., and for the purpose of covering up said scheme of cheating, wronging and defrauding these

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plaintiffs, said defendants made the consideration in the contract of sale and deed to said purchaser \$....., and said defendants collected the other \$..... from H. and converted same to their own use, and then charged and collected of these plaintiffs another \$....., on the representation and statement that they had sold the said land for \$..... only, and the defendants fraudulently and intentionally concealed from these plaintiffs the fact that they had received the \$..... from the purchaser, and these plaintiffs did not discover the fraud so perpetrated upon them until about one month after the transaction, and then learned it through other sources than from the defendants; and the said defendants have by reason of their fraudulent misconduct, as the agents of these plaintiffs, forfeited their right to any commission or any compensation whatever for their services in and about the matters herein set forth, and these plaintiffs are entitled to the return of \$..... from the defendants, and each of them, by reason of their fraudulent conduct, as aforesaid.

Wherefore, by reason of the premises an action has accrued against said defendants and in favor of these plaintiffs for the sum of \$....., which they claim and for which they ask judgment, with interest thereon at per cent. per annum from the day of, 19.., and for the costs of this action, and for such other and further relief as may be just in the premises.¹

651. ALLEGATIONS IN ACTION BY AGENT AGAINST PRINCIPAL FOR COMMISSION ON CONTRACT TO SELL REAL ESTATE.

Plaintiff for her cause of action states:

2. That on or about the day of, 19.., said defendant employed plaintiffs to procure a purchaser for certain tracts of land owned by him and situate in the counties of E. and C., in the State of Kansas, for the sum of dollars, and said defendant then and there promised and agreed to pay to the said plaintiffs the sum of

¹ From form in record in *Deter v. Jackson*, 76 Kan. 568.

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dollars for procuring a purchaser at the sum aforesaid, said sum to be paid upon such terms and in such manner as could be mutually agreed upon between the purchaser so procured by plaintiffs and the said defendant.

3. That in pursuance of said agreement, verbally had between plaintiffs and defendant, said plaintiffs procured a purchaser for defendant's land and took such purchaser to said defendant, and such purchaser, so as aforesaid procured by plaintiffs for defendant's said land, and the said defendant then and there agreed upon the sale of said land for the aforesaid sum of dollars, and agreed upon the times and terms of payment thereof, and that said purchaser was ready, able and willing to pay said price for said land; said agreement of sale between the purchaser, so as aforesaid procured, and said defendant, as to the price of said land and the terms of payment for same, being verbal.²

652. ACTION FOR COMMISSION BY REAL ESTATE BROKER.

Plaintiff states that he is a real estate agent in the city of, county of, State of

That on, to-wit, ..., 19.., defendant was the owner of a certain house and lots in the county of aforesaid; that the said defendant requested plaintiff to sell or assist in the selling or trading of said property, and agreed to pay plaintiff the sum of, to-wit, ... dollars as a commission for his services in selling or assisting in the selling or trading said property; that on, to-wit, the day of, 19.., defendant sent one F. S. to B. H. to see this plaintiff and have him show said property to him, and that thereupon the said plaintiff did exhibit the said property to said S., did use his best endeavors to negotiate the sale or trade of said property to said S. and that thereafter on, to-wit, ..., 19.., the said S. did trade with said defendant and thereby became the owner of the said county property.

² Form in Long v. Thompson, 73 Kan. 76.

653. ACTION BY AGENT FOR COMMISSIONS ON ORDERS TAKEN.

Plaintiff states that on or about the day of, 19.., said defendant, through its president, one R. A. B., made a contract with the plaintiff, by the terms of which he was to be paid by said defendant a commission of per cent. on all goods sold by him in behalf of said defendant, one-half of said commission upon acceptance of order by defendant, and one-half when said goods were delivered to the purchaser thereof.

That in pursuance of said contract and agreement, plaintiff on or about the day of, 19.., began negotiations with the Co., a corporation, for a large number of advertising busts, known as F. busts, to be used by said company in advertising their business, and after much correspondence with defendant, and work by plaintiff relative to said busts, for the said company, R. A. B., president of said B. Co., came to St. L. and closed a contract with said company for a large number of said busts, to-wit, ..., at and for the price of dollars per bust, making a total sum of dollars.

Plaintiff states that the order for said busts was accepted by said defendant and that said goods have been shipped to said Co. the defendant, and that there is now due and unpaid plaintiff for commission on said sale the sum of dollars, which has been demanded of defendant and payment refused.

Wherefore, etc.³

³ In an action for a commission a real estate broker may join a count for the reasonable value of his services with a count based upon an express contract to pay a stated commission. *Berry v. Craig*, 76 Kan. 345.

Where a petition properly alleges a contract of employment in relation to the sale of real estate, and avers facts showing a full performance of the broker's duty to his employer, and the accomplishment of all he undertook to do, under his contract, it is a sufficient pleading as against demurrer, of a cause of action for compensation for such services. *Yoder v. Randol & Nix*, 16 Okla. 308.

Proof of ratification includes proof of agency and authority, and may be made under a pleading charging the ratified act to be that of the principal. *Aultman v. Knoll*, 71 Kan. 109.

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The averment in a petition that a certain person was general manager of a railway company, and that on behalf of the company he promised to give a pass over its roads, is a sufficient allegation of the authority of the agent after judgment for plaintiff, when there is no showing that such averment was challenged in the trial court. *Atchison, T. & S. F. Ry. Co. v. English*, 38 Kan. 110.

A failure to deny under oath an allegation that a principal through an agent did a certain act is not an admission that the principal did the act complained of. *Leavenworth Light and Heating Co. v. Waler*, 65 Kan. 514.

Petition in action for commission on contract to sell real estate considered and held sufficient. *Johnson v. Huber*, 80 Kan. 591.

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CHAPTER LII.

PRINCIPAL AND SURETY.

654. Action by one of two sureties against a co-surety to recover contribution for the co-sureties' proportion of the debt paid by the plaintiff.
655. Action by surety against principal and others on a promise to indemnify surety against loss by reason of said surety contract.
656. Action by surety on a note against the principal for money paid by surety in discharge of note.
657. Action by the surety on an appeal bond against the principal on said bond and others praying for equitable relief and for the setting aside of certain deeds of trust executed by the principal, alleging that said deeds of trust are fraudulent.
654. ACTION BY ONE OF TWO SURETIES AGAINST A CO-SURETY TO RECOVER CONTRIBUTION FOR THE CO-SURETIES' PROPORTION OF THE DEBT PAID BY THE PLAINTIFF.

The plaintiff, P. G., complains of the defendant, J. B. S., and for cause of action states:

1. That at S., Illinois, on, 19.., a certain firm, then and there doing business under the name and style of S. B., being indebted to L. J. G., of C., Ohio, in the sum of dollars, desired to give said L. J. G. their certain promissory note for said amount and applied to this plaintiff and the defendant to become sureties therefor; and thereto the plaintiff and defendant consenting, the said firm of S. B., and this plaintiff and the defendant herein, did then and there execute and deliver to said L. J. G., their certain promissory note in the words and figures to-wit: (here insert note).

2. And thereupon the said firm of S. B. and this plaintiff and the defendant herein, became and were bound for the payment of said promissory note, the said firm of S.

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B. as principals, and this plaintiff and the defendant herein as sureties.

3. Plaintiff avers that thereafter on maturity of said note, and prior thereto the said firm of S. B. became and were insolvent, and refused to pay said note, and upon the demand of the payee of said note, at maturity being thereto bound, this plaintiff did on , 19.., pay to the order of said L. J. G., the amount due by reason of said note, being then the sum of dollars, and the said L. J. G. delivered said note to this plaintiff, who has since been the owner and holder thereof by virtue of the premises as hereinbefore stated. A copy of which said note is filed herewith as a part hereof and marked "exhibit A."

4. Plaintiff further avers that said firm of S. B. have since the payment of said note by this plaintiff, remained insolvent and have not paid to this plaintiff any part of said debt or reimbursed her in any way for the payment thereof, although often requested so to do; and that the defendant herein has not paid to this plaintiff any part of said debt, nor reimbursed her in any way for the payment thereof, although often requested so to do; and that said defendant is justly indebted to this plaintiff for his proportionate share of said surety debt.

5. That there is due and owing to plaintiff from the defendant on account of the payment of said note, a copy of which is hereto attached and marked "exhibit A," the sum of dollars together with interest thereon at the rate of per cent. per annum from , 19.., until paid.

Wherefore, plaintiff prays judgment against the said defendant for dollars and for costs and other proper relief.¹

**655. ACTION BY SURETY AGAINST PRINCIPAL AND OTHERS
ON A PROMISE TO INDEMNIFY SURETY AGAINST LOSS
BY REASON OF SAID SURETY CONTRACT.**

Plaintiff states that on the day of , 19.., Mrs. M. B. H. was conducting a hotel in L., in the State

¹ From form in record in Strickler v. Gitchel, 14 Okla. 523.

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of, and owned the furniture therein; that E. T. H. had chattel mortgage on all the furniture in said hotel owned by Mrs. M. B. H.; that E. T. H. and M. B. H. were receiving the sum of dollars per month income from the hotel and in order that E. T. H. might continue to receive such income Mrs. A. A. M. at the request of E. T. H. and M. B. H. became surety for Mrs. M. B. H. on a note she executed on that date to one S. for the sum of dollars, said E. T. H. and M. B. H. promising and agreeing with Mrs. A. A. M. that if she would become surety on said note that they, E. T. H. and M. B. H. would pay said note at maturity without trouble or damages to Mrs. A. A. M.

Plaintiff states that relying on the terms of E. T. H. and M. B. H. she signed said note as surety for Mrs. M. B. H. payable to S. in the sum of dollars, due on the day of, 19...

Plaintiff states that said note was not paid at maturity, that S. the payee and holder of said note instituted suit thereon against Mrs. M. B. H. and this plaintiff A. A. M. and secured judgment against both of said defendants.

Plaintiff states that by reason of said judgment she has been compelled to pay the same to her damage in the sum of dollars and interest.

Wherefore, etc.²

656. ACTION BY SURETY ON A NOTE AGAINST THE PRINCIPAL FOR MONEY PAID BY SURETY IN DISCHARGE OF NOTE.

Plaintiff complains of the defendant and alleges: that on the day of, 19.., he became surety for the

² Adapted from form in *Minick v. Huff*, 41 Neb. 516.

A verbal promise of the first party to the second party to indemnify said second party if he will become surety for a third party for the debt of said third party to a fourth party is not a promise on the part of the first party to answer for the debt of the third party within the meaning of the statute of frauds. *Minick v. Huff*, 41 Neb. 516.

Surety must first have paid the debt of his principal or some part thereof before he can recover of his principal because of his suretyship. *Minick v. Huff*, 41 Neb. 516.

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defendant A. B. on a note dated day of, 19.., due in months after date for the sum of dollars, payable to C. D. or order. Said note is herewith filed, marked "exhibit A", and made a part hereof.

Plaintiff states that when said note became due on the day of, 19.., A. B. failed to pay the same and plaintiff was compelled to pay C. D., the payee thereof, the sum of dollars in discharge of said note and that no part of said sum of dollars has been repaid to plaintiff by defendant A. C.

Wherefore plaintiff prays judgment for dollars, interest and costs.³

657. ACTION BY THE SURETY ON AN APPEAL BOND AGAINST THE PRINCIPAL ON SAID BOND AND OTHERS PRAYING FOR EQUITABLE RELIEF AND FOR THE SETTING ASIDE OF CERTAIN DEEDS OF TRUST EXECUTED BY THE PRINCIPAL, ALLEGING THAT SAID DEEDS OF TRUST ARE FRAUDULENT.

Plaintiff for cause of action states that heretofore, to-wit, on or about the day of, 19.., he signed and

³ **Action by surety before paying obligation.** In an action by sureties (Oklahoma) against their principal it is not necessary that the petition should allege that the sureties had settled or paid the debt for which they were bound by their obligation as sureties. Under section 546 of the Code of Civil Procedure, a surety may maintain an action against his principal to obtain indemnity against a debt or obligation for which he is bound, before it is due and without having first paid or satisfied the same, whenever any of the grounds exist upon which an order of attachment may issue. *Walton v. Williams*, 5 Okla. 642.

A surety on a matured debt may maintain action against the principal to compel its payment without showing any fraudulent disposition of property or other special reasons for fearing loss. *Hutchinson Wholesale Grocer Co. v. Brand*, 79 Kan. 340.

Surety not liable for trespass of officer. A petition, in an action for damages for trespass, does not state a cause of action against a surety on the official bond of an officer charged with its commission, nor against the sureties of a defendant therein, who was plaintiff in a forcible entry and detainer action out of which grew the alleged trespass, where it fails to allege that such sureties contributed thereto either as actors, directors, requesters, aiders or abettors, or who after its commission assumed the benefit of it. *Sanders v. Cline*, 22 Okla. 154.

executed as surety for S. S., defendant, a certain appeal bond in an appeal from a judgment rendered against said S. S. by F. A. C., a justice of the peace in and for the district of the city of, ..., that by reason of said contract of suretyship plaintiff was compelled to pay and did pay said judgment and costs, all amounting to dollars, for which said amount he recovered judgment against the said S. S. on or about the day of, 19.., in the justice court in and for the justice district of the city of, before J. T. S., justice.

Plaintiff further states that heretofore, to-wit, on or about the day of, 19.., defendant S. was the owner in fee simple of the following described real estate, situated in the city of, ..., to-wit; (here describe property).

That on or about the said day of, 19.., the said S. S. conveyed said property as hereinbefore described to defendant A. G., in trust, to secure an indebtedness of dollars, to one F. H.; that thereafter, to-wit, on or about the day of, 19.., said S. S. executed a second deed of trust to the M. T. Co., to secure an alleged indebtedness of dollars to defendant V. B.

Plaintiff further states that on or about the day of, 19.., defendant A. G., acting under and by virtue of said first deed of trust, sold the said property at public sale and said property was bid in by defendant V. B. for the sum of dollars; that said V. B. has failed and refused and still refuses to complete said sale by paying the full sum of dollars to said A. G., unless she can get credit for the amount of the surplus of said dollars over and above so much as may be required to pay off the indebtedness of dollars on said first deed of trust, together with such costs and interest as may have accrued, on her second deed of trust.

Plaintiff further alleges that said second deed of trust on said property hereinbefore described executed to secure an alleged indebtedness to defendant V. B., was fraudulent and without consideration and given by defendant S. for the purpose of avoiding liability on said judgments of Justice

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C. and the appeal bond executed therein, and for the purpose of defrauding the plaintiff in that said case, to-wit, the D. T. Co., and defeat the payment of said judgment by him, and for the further purpose of defrauding this plaintiff by compelling him to pay the said judgment of Justice C. against said S.

Plaintiff further states that both defendant S. and V. B. are insolvent; that he is without remedy at law and except by the interposition of a court of equity he must remain totally remediless in the premises and his said judgment must remain wholly unpaid.

Wherefore, plaintiff prays for a decree directing that in the event that defendant V. B. completes said sale and pays said G. said sum of dollars said G. be required, after paying such amount as may be required to discharge the indebtedness of said first deed of trust and expenses of the sale, to pay into the court so much of the surplus as may be necessary to pay plaintiff's judgment and costs, as well as the costs of this suit, or, should said V. B. fail to complete said sale and pay said sum of dollars to trustee A. G., then plaintiff prays for a decree declaring said second deed of trust inoperative and void as fraudulent and without consideration, and for an order that said property be sold by order of this court, subject to the first deed of trust and the proceeds of said sale, or so much thereof as may be necessary to be applied to the payment of plaintiff's said judgment and costs, as well as the costs of this suit and such other and further relief as the court may deem meet and just in the premises and the circumstances of the case may require.

CHAPTER LIII.

QUIETING TITLE.

- 658. Action to quiet title praying for an order declaring defendant's claim null and void.
- 659. Action to quiet title in plaintiff who claims real estate as her homestead, the husband having absconded, and the property sold by trustee in bankruptcy.
- 660. Action to quiet title.
- 661. Same—Another form.
- 662. Form of affidavit for service by publication in action to quiet title.
- 663. Form of notice of publication to non-resident in action to quiet title.
- 664. Action to quiet title in plaintiff to certain real estate, with offer to pay to defendants who claim title any taxes paid by them.
- 665. Action to quiet title to certain real estate as against certain heirs claiming adversely.

658. ACTION TO QUIET TITLE PRAYING FOR AN ORDER DECLARING DEFENDANT'S CLAIM NULL AND VOID.

Comes now plaintiff, N. C. M., and for cause of action against defendant, W. M., alleges: That plaintiff is the owner in fee simple and in the possession of the following described real estate, located in the county of C., State of (here describe property).

That the defendant claims an interest therein to said property adverse to the plaintiff's rights and which interest he claims to have procured by the purchase of said property at sheriff's or execution sale; that the property was sold on execution by the sheriff of C. county, state aforesaid, and sold as the property and estate of one L. F. W., that the said L. F. W. had no interest claim or demand either at law or equity in or to said property; that the said alleged deed or conveyance was null, void and of no effect when sold as the property of said L. F. W.; that the claim which the defendant alleges to have is without right and un-

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founded either in law or equity and is a cloud upon plaintiff's title.

Wherefore, plaintiff prays the court that defendant's claim be declared null and void, and that plaintiff's title to said real estate be quieted.¹

659. ACTION TO QUIET TITLE IN PLAINTIFF WHO CLAIMS REAL ESTATE AS HER HOMESTEAD, THE HUSBAND HAVING ABSCONDED, AND THE PROPERTY SOLD BY TRUSTEE IN BANKRUPTCY.

The plaintiff above named for a cause of action against the defendant above named, alleges: That she is a married woman and the wife of J. W. W., and that she has a family of minor children whose names and ages are as follows: (here set out) all of whom are living with and are being supported by and cared for by plaintiff.

2. That plaintiff is a resident of D. county, ..., and owns in her own name the following described property (here describe) which property became the homestead and was lived upon, used and occupied by this plaintiff with her said family from, ..., 19.., or thereabouts until on or about the day of, 19.., when plaintiff removed therefrom temporarily to O. C., ..., for the purpose of educating her said minor children and giving them a common school education, there being no school facilities in the neighborhood of said land, and plaintiff is now temporarily residing in said city, but intends to and will return to the above tract of land and homestead, and again reoccupy it as her home with said minor children as soon as they have secured the rudiments of a common school education; that plaintiff has no other tract of land which she has ever used or occupied as a homestead, or which she can use or occupy as a homestead; that some time in, 19.., plaintiff's husband, J. W. W., being in financial troubles, the nature of which were unknown to plaintiff, and in great mental distress absconded to some foreign country unknown to plaintiff, and has never since returned, and is now living separate and apart from this plaintiff and his

¹ From form in record in *Momsen v. Mosier*, 13 Okla. 41.

family, and is not providing them with any home; that sometime after he had absconded as aforesaid, and while plaintiff was living upon and occupying said tract of land as a homestead, with her said children, and claiming the same as such homestead, the estate of J. W. W. was seized by process of law at the instance of his creditors and thrown into involuntary bankruptcy, and the same ever since has been and is now in charge of E. W. S., referee in bankruptcy, of said district, of which said estate, one J. W. M., is the duly elected and qualified trustee; that on or about, ..., 19.., as your petitioner is informed and so charges the fact to be, the said referee issued an order to said trustee of some nature, the exact terms of which are unknown to your petitioner, directed him to sell and convey all the right, title and interest of said J. W. W. in and to said tract of land and as plaintiff is informed said trustees did make a pretended sale of the pretended interest of J. W. W. in said tract of land to the defendant above named for a small consideration, the exact amount of which is to plaintiff unknown, and has delivered to said defendant a deed of some kind, the exact nature of which is unknown, and in plaintiff's absence has placed or has attempted to place said defendant in possession of said property; the defendant is about to take open and physical possession of said homestead without authority of law, and to her great and irretrievable damage and injury, and thus deprive her and her said children of a home, and of the use and benefit of their homestead given and guaranteed to them under the laws of said territory.

3. That the said defendant knew at the time he purchased or attempted to purchase the said pretended interest of J. W. W. from said trustee that he, the said J. W. W., had no interest, right, title, or claim in and to said tract of land, and that said land was the homestead of plaintiff, and exempt by law to her, and that she was the owner in fee simple thereto, and that she was the head of a family and that his pretended purchase of said land and the sale thereof, or any

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part or interest therein, was illegal and contrary to law, and that said sale is in all respects irregular and void.

Wherefore plaintiff prays that the deed of conveyance now held by the said T. S. P. as aforesaid, be canceled, annulled and held for naught; that the defendant be adjudged and decreed to have no right, title or claim in and to said tract of land, or any part thereof, and for such and further relief as may be equitable and just, and for costs.²

660. ACTION TO QUIET TITLE.

Plaintiff alleges that he is in the quiet and peaceable possession of the following described real estate (here describe) in B. county, Kansas, and has been for more than two years last past; that he has the equitable title to said land under and by virtue of a contract of purchase from E. W., the then owner of the above-described tract of land, who has since died, and that the above-named defendants are his heirs, and that they, the said defendants, set up and claim an estate and interest in and to said premises adverse to the estate and interest of the said plaintiff as aforesaid averred; that the plaintiff has complied with all the terms and conditions of said contract of purchase on his part, and is entitled to a decree in his favor of the legal title to said land.

The plaintiff therefore prays that the said L. W., Sr., C. W., R. W. and L. W., Jr., be compelled to show their title, and that it may be determined null and void as to and against said title of the said plaintiff.³

661. SAME—ANOTHER FORM.

Plaintiff states that he is the owner of and in the possession of the following described real estate, situated in B.

² Adapted from form in *Womble v. Pike and Murphy*, 17 Okla. 122.

Possession of land. An abandoned wife and the head of a family of minor children who has temporarily removed from the land in question to a city to educate her children with intent to return to the land has within the meaning of the statute possession of the land sufficient to entitle her to maintain an action to quiet title. *Womble v. Pike and Murphy*, 17 Okla. 122.

³ Form in *Great Bend Land and Lot Co. v. Cole*, 52 Kan. 790.

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county, Kansas, to-wit: (here describe). The plaintiff further states that the defendant claims an interest in said real estate adverse to the plaintiff's, the exact nature of which claim of the defendant is not known to the plaintiff, but the plaintiff alleges that the claim of defendant, whatever it may be, is subordinate and inferior to that of the plaintiff.

Wherefore plaintiff prays that the said pretended interest of defendant in said real estate may be determined, and the same be declared invalid and of no force and effect as against the estate, interest and ownership of the plaintiff therein.⁴

662. FORM OF AFFIDAVIT FOR SERVICE BY PUBLICATION IN ACTION TO QUIET TITLE.

I. A. L., being first duly sworn, says: That he is attorney for the plaintiff herein; that service of summons herein cannot be made upon the defendant in this state; that the defendant is a non-resident of this state, and that the above action is in relation to real estate situated within the state, in which the defendant claims an interest, and that the relief demanded is to exclude the defendant from any interest therein.

I. A. L.

Subscribed and sworn to before me, this day of 19...

F. O. M., Clerk District Court.⁵

663. FORM OF NOTICE OF PUBLICATION TO NON-RESIDENT IN ACTION TO QUIET TITLE.

Notice to non-resident. The defendant, J. H. D., is hereby notified that he has been sued by the plaintiff in the above-entitled action in the above court, and that he must answer the petition of the plaintiff in said action filed, on or before

⁴ Form in *Havens v. Drake*, 43 Kan. 484, 485.

⁵ Form in *Dillon v. Heller*, 39 Kan. 599.

A decree quieting title to real estate, where the only service upon the defendants is made constructively as provided by the statute for non-residents of the state, is not void because the grounds stated in the affidavit are untrue. *Davis v. Vinson Land Co.*, 76 Kan. 27.

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the day of, 19.., or the same will be taken as true, and judgment will be rendered, quieting the title in the plaintiff to the following-described real estate, situated in H. county, State of Kansas, to-wit: (here describe).

Witness my hand and the seal of said court, this day of, 19...

F. O. M., Clerk District Court.*

*Form in *Dillon v. Heller*, 39 Kan. 599.

Description of real estate in a suit by publication held sufficient in *Caldwell v. Bigger*, 76 Kan. 49.

What petition must contain. Comp. Laws Okla. 1909, sec. 6122; Gen. Laws of Kan. 1909, sec. 6213.

When the plaintiffs in a foreclosure suit attack certain tax deeds, set up by a party interpleading in the case, and ask that their title be quieted as against such tax deeds, they should show some title in the mortgagor, to entitle them to a judgment and decree. *Ordway v. Cowles*, 45 Kan. 447.

Where a plaintiff alleges that he is the legal owner of and in the actual possession of a quarter section of land; that he is a married man and the head of a family; that the defendant sets up some title to the land under a conveyance from a grantor, who has fraudulently obtained from the plaintiff a deed in which his wife did not join, and asks that his title thereto be quieted,—the wife is not a necessary party plaintiff. *Davies v. Cole*, 28 Kan. 184.

A petition which alleges that the plaintiff "has the legal title to, and is in the peaceable possession of, the property in controversy," describing it, and that the defendant "sets up and claims an estate and interest in and to said premises adverse to the estate and interest of the said plaintiff so as aforesaid," and then prays that the defendant "may be compelled to show his said title, and that it may be determined to be null and void as against the said title of the plaintiff," will be held sufficient, when such petition is attacked by an objection to the introduction of any evidence under it. *Cartwright v. McFadden*, 24 Kan. 473.

In an action to quiet the title to several lots of land, and where the allegations of the petition are unquestionably good as to a part of them, a general demurrer thereto that the petition does not state sufficient facts cannot be sustained. *Aldrich v. Boice*, 56 Kan. 170.

The plaintiff may assert his right because of adverse possession and also set up a tax title which he has purchased, and he cannot be compelled to elect as to which he will rely upon. *Liebheit v. Enright*, 77 Kan. 321.

Petition held to state a good cause of action for discovery and relief. *Bowdish v. Metzger*, 71 Kan. 753.

Possession to maintain (Kansas and Oklahoma). The plaintiff

664. ACTION TO QUIET TITLE IN PLAINTIFF TO CERTAIN REAL ESTATE, WITH OFFER TO PAY TO DEFENDANTS WHO CLAIM TITLE ANY TAXES PAID BY THEM.

Plaintiffs state that they have the legal title in fee to, and are in peaceable possession of, the following described piece of land, situated in the county of D., and State of Nebraska, to-wit: (here describe).

must have actual possession of the property, either by himself or tenant, and this must be alleged and proved. *Pierce v. Thompson*, 26 Kan. 714.

An action to quiet title may be maintained by the holder of the legal title, when he is not in possession, if the premises be vacant and unoccupied. *Christy v. Springs*, 11 Okla. 710.

Where real estate is vacant and unoccupied, the plaintiff cannot sustain an action to quiet title or possession, where he neither shows title in himself nor actual possession of the premises either by himself or tenant. *Eaton v. Giles*, 5 Kan. 21; *Douglass v. Nuzum*, 16 Kan. 515; *O'Brien v. Creitz*, 10 Kan. 158.

Before an action to quiet title to real estate can be maintained, the plaintiff must have either the actual possession thereof, or the legal title. *Wood v. Nicolson*, 43 Kan. 461.

In an action to remove a cloud upon a title, under a petition setting out all of the facts, similar to a bill in equity, and independent of statutory regulations, it is not necessary to allege that the plaintiff was in possession of the premises. *Grove v. Jennings*, 46 Kan. 366.

A person in the actual possession of real estate may maintain an action under the provision of the code to quiet title and the possession thereto, against any person who claims to have an adverse interest therein. *Giles v. Ortman*, 11 Kan. (60) 55; *Brenner v. Bigelow*, 8 Kan. 332; *Entreken v. Howard*, 16 Kan. 551.

A party in the quiet, peaceable, and rightful possession of real estate, claiming title thereto has such an interest therein, although his title may be ever so defective, that he may maintain an action to quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all. *Morrill v. Douglass*, 14 Kan. (293) 228; *Giltinan v. Lemert*, 13 Kan. 355.

A statement in a petition in a suit to quiet title that the plaintiff is the owner in "fee simple," and is in actual possession, sets forth the plaintiff's title with sufficient certainty. *Parker v. Conrad*, 74 Kan. 111.

A plaintiff may have his title quieted to land sold for taxes in an action for that purpose, where his petition counts upon general equitable considerations, and does not show in whom the possession is; especially so, when the answer avers that the land is vacant and unoccupied. *Shinkle v. Meek*, 69 Kan. 368.

Plaintiff cannot unite in one suit a demand to quiet title to land

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And the said plaintiffs further allege that P. F., one of the above-named defendants, or his co-defendant, J. A. H., in his, the said F.'s name, sets up and claims an estate and interest of the said plaintiffs in and to said premises, which said estate and interest the plaintiffs believe is claimed under and by virtue of a pretended tax deed issued on the day of, 19.., by A. C. A., treasurer of D. county, Nebraska, and recorded in book of deeds, page, in the office of the register of deeds of D. county, Nebraska, pretending to convey the said premises to said F., under a purchase of said premises on the day of, 19.., at a treasurer's sale for the taxes of 19..,

And the said plaintiffs further allege that said treasurer's deed is null and void, and conveys no title to said premises to the said F., but that said claim and interest in said premises, by virtue of said pretended deed, thereby beclouds the title of the plaintiffs thereto, and if the said F. has any interest in said premises it is only the interest of a lienor who has paid taxes on said property.

But the aforesaid plaintiffs allege that the said F. himself did not pay any taxes or purchase said property, or receive the certificates from the treasurer of D. county for the purchase of said property, but that said taxes were paid and purchase made by said J. A. H., one of the defendants in this case, who at that time claimed the title to said premises, and that he paid said taxes in the name of P. F., and had the treasurer issue the certificates of sale and the pretended deed in the name of the said F., but for his, the said H.'s benefit; and for the protection of the title, which he claimed to hold, of said property.

And the plaintiffs allege that the said J. A. H. and L. R., defendants, as lienors, by reason of having paid certain in different counties where the defendants were not the same. *Jones v. Investment Co.*, 79 Kan. 477.

Amending petition. A petition in a suit to quiet title may be amended before answer so as to change the action to one in ejectment, where no prejudice to the defendant results. *Curtis v. Schmehr*, 69 Kan. 124.

Amendment in particular case. *Newell v. Newell*, 14 Kan. 160.

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taxes on said property, or otherwise, have some pretended interest in the premises, which beclouds the title of the plaintiffs thereto. And the said plaintiffs hereby offer and stand ready to pay any and all claims, with lawful interest, which the defendants have against said premises by reason of taxes or assessments paid by them, which have been lawfully assessed against said premises, and which the plaintiffs ought in equity to pay.⁷

665. ACTION TO QUIET TITLE TO CERTAIN REAL ESTATE AS AGAINST CERTAIN HEIRS CLAIMING ADVERSELY.

Plaintiff for his cause of action states:

That he is, and has been for about years, the owner and in possession of the following described property, to-wit: (here describe); that he purchased said land of one J. C. prior to the year 19.., for a valuable consideration; that on or about, ..., 19.., a deed to said land was made by said J. C. to one A. W. C., a brother of plaintiff; that said deed, which is duly recorded in the records of deeds of said county, was made without consideration and with the purpose and intent of him, the said J. C., who at the time was old and infirm, that said land should be conveyed by said A. W. C. to the plaintiff, who was absent from the home of said parties in N. H. and engaged in business in M.; soon after the making of said deed, to-wit, ..., ..., 19.., said A. W. C. suddenly died; very soon after his death, P. G. C., his widow, at the request of J. C. and one F., a lawyer and near friend, deeded said land to plaintiff, acting for herself and as guardian of her three minor children, defendants; but said deed was not recorded and has since been lost; that plaintiff has been in continuous and undisputed possession of said land from 19.. to the present time and has paid all the taxes thereon since said date, amounting to about dollars; that about, 19.., defendants herein, the legal heirs of said A. W. C., made a deed to this plaintiff for said land, understanding at the time that said deed was for the pur-

⁷ Form in *Baldrige v. Foust*, 28 Neb. 259.

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pose of placing the legal title to said land of record in plaintiff; said deed is duly recorded in book "Q" of deeds for said county, at page; that plaintiff claims title to said land in fee and defendants claim an estate or interest adverse to plaintiff which is without any right whatever, and that they have no interest or estate in said premises or any part thereof. Plaintiff prays that all adverse claims of defendants may be determined by decree of court; that said deed from J. C. to A. W. C. may be declared null and void; that by decree it be declared that defendants have no estate or interest whatever in and to said land; that the title of plaintiff be declared good and valid; that defendants be barred from asserting any claim whatever to said lands adverse to plaintiff, and that plaintiff have general relief.³

³ Form in *Clark v. Clark*, 21 Neb. 402.

What petition must contain. A petition in an action in the nature of an action *quia timet* to remove a cloud from the title of land, which fails to contain an allegation that the plaintiff owns, or claims such land, or has title thereto, is demurrable. *Brewer v. Board of Commissioners of Merrick County*, 15 Neb. 180.

A petition should state facts, showing the character, nature, extent, and invalidity of the defendant's claim which constitutes the cloud upon the plaintiff's title to the lands in question. *McDonald v. Early*, 15 Neb. 63.

When, in an action to quiet title, the petition sets forth the adverse title or interest in general terms, but without especial or particular description, the pleading is not for that reason obnoxious to a general demurrer, but the remedy of the defendant is a motion to require the petition to be made more definite and certain. *State ex rel. v. Alter*, 80 Neb. 405.

In an action to quiet title to real estate the plaintiff may allege in his petition as many claims of ownership as he may have. *Draper v. Taylor*, 58 Neb. 787.

Where a petition to quiet title states that defendant has no interest in the land, but claims an unfounded dower interest therein, a reply alleging the claim is unfounded by reason of defendant's non-residence does not introduce a new cause of action. *Miner v. Morgan*, 83 Neb. 400.

An allegation in a pleading that the grantor made and executed a deed, includes all acts essential to the completion of the muniment of title,—the delivery of the instrument to the grantee as well as the signature of the grantor. *Brown v. Westerfield*, 47 Neb. 399.

Possession to maintain action (Nebraska). Any person claiming

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title to real property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title. *Foree v. Stubbs*, 41 Neb. 271; *Hall v. Hooper*, 47 Neb. 111.

Who may maintain action. An action to quiet the title to real estate may be maintained by the remaindermen during the continuance of the particular estate. *First National Bank of Perry v. Pilger*, 78 Neb. 168; *Hall v. Hooper*, 47 Neb. 111.

Form of petition in action to quiet title to real estate. *Sock v. Suba*, 31 Neb. 228.

Form of petition in action to quiet title, with supplemental petition and other pleadings. *Lancaster County Bank v. Gregory*, 24 Neb. 656.

Form of petition in action to quiet title to certain real estate, sustained on demurrer in *Fritz v. Grosnicklaus*, 20 Neb. 413.

Allegations in action to quiet title. *Barney v. Chamberlain*, 85 Neb. 786.

CHAPTER LIV.

RAILROADS.

- 666. Action for damages for value of barn burned by fire alleged to have been set by sparks from locomotive.
- 667. Action against railroad company for damages caused by fire set from sparks from locomotive, burning plaintiff's grass and trees.
- 668. Action for damages for loss by fire alleged to have been started by sparks from a locomotive.
- 669. Action for damages arising from fire alleged to have been started by sparks from a locomotive.
- 670. Action for damages resulting from fire set by locomotive.
- 671. Allegations of negligence, first, in permitting combustible sheds and buildings on right of way, second, incompetent and unskillful agents in charge of locomotives, and third, failure to supply suitable spark arresters.
- 672. Allegation of negligence in action for damages caused by fire set by locomotive.
- 673. Allegations of negligence in an action for damages caused by fire set by sparks from a locomotive.
- 674. Allegation of negligence in an action for damages caused by the escape of fire from a locomotive.
- 675. Allegations of negligence in action for damages caused by fire escaping from a right of way while burning dry grass thereon.
- 676. Allegation of plaintiff and prayer asking attorney fee, in cases of damages caused by fire set by railroad company.
- 677. Action against a railroad company for damages for killing stock alleging defective and insufficient fences.
- 678. Action for damages for value of stock killed by railroad company on its right of way.
- 679. Action for damages against railroad company for killing stock, alleging failure to fence track.
- 680. Action to recover damages for killing and injuring plaintiff's horses on defendant's right of way alleging negligence in maintaining insufficient gate and in frightening horses.
- 681. Allegations that defendant assumed control of line of railway and became liable for damages.
- 682. Action against a railroad company for damages for obstructing the means of access to plaintiff's property by building a railroad in the street in front of his property.

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683. Action for damages for breach of contract to give plaintiff pass over road, in consideration of giving right of way.

666. ACTION FOR DAMAGES FOR VALUE OF BARN BURNED BY FIRE ALLEGED TO HAVE BEEN SET BY SPARKS FROM LOCOMOTIVE.

Comes now O. L. S., and for his cause of action against the defendant, the St. L. and S. F. R. Co., states:

That plaintiff, O. L. S., is a resident of B. county, State of, and that defendant, St. L. and S. F. R. Co., is, and at all times herein stated, was, a corporation organized and existing under and by virtue of the laws of the State of, and engaged in operating a railroad through the town of D., ..., west to the town of A., in said state, and was using and operating thereon steam engines and locomotives.

That on or about the day of, 19.., plaintiff, O. L. S., was the owner of a certain barn situated on lots number and in block number in the said city of D., ..., about forty yards north of the track belonging to defendant, St. L. and S. F. R. Co.

That about three o'clock in the afternoon on or about the said day of, 19.., said barn was wholly destroyed by fire; said barn was at the time of the reasonable cash value of \$......; that the fire which destroyed said barn was negligently set and communicated thereto by a locomotive engine run and operated by defendant upon its railroad aforesaid; that about three o'clock on or about the day of, 19.., aforesaid, the said locomotive engine passed the barn aforesaid, that locomotive engine was so negligently constructed in that it did not have a modern and sufficient spark arrester; was so defective in the matter of its spark arresting appliances; was so negligently out of repair in said respect; was so negligently operated by defendant's servants; and defendant's road opposite the barn aforesaid was so negligently constructed as to cause said locomotive engine while opposite said barn to throw out a great and unusual volume of sparks and fire, which sparks and fire were blown by the wind into said barn and set fire thereto

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which consumed same, and damaged plaintiff herein in the sum of \$., the aforesaid value of said barn.

That to the best of plaintiff's knowledge, information and belief the number of the locomotive engine which set said fire was engine number, the train number; that plaintiff is unable to give the names of the engineer and fireman that operated said engine.

Wherefore, premises considered, plaintiff prays judgment for the said sum of \$. and for all his costs herein laid out and expended.¹

667. ACTION AGAINST RAILROAD COMPANY FOR DAMAGES CAUSED BY FIRE SET FROM SPARKS FROM LOCOMOTIVE, BURNING PLAINTIFF'S GRASS AND TREES.

1. The plaintiff for cause of action alleges that the defendant is a corporation duly organized under the laws of the State of That for more than one year last past it has owned and operated a railroad from east to west through H. county, ...

2. That on the day of, 19.., the plaintiff was the owner in fee simple of the (describe premises) in H. county, Nebraska, and was in possession of said premises and was the owner of all hay and grass growing thereon and was also the owner of all trees growing thereon.

3. That on said day of, 19.., the railroad of the defendant was being operated by the defendant and it had trains and engines running thereon and that said railroad lay to the south of said tract of land. That the defendant then owned and was then operating a gravel-pit along this said railroad, one mile and a half to the south and east of said premises above described, and on said date the defendant was operating an engine and train of cars at and in the vicinity of said gravel-pit, and that the defendant and its agents and servants carelessly and negligently caused and permitted sparks and coals of fire to be emitted and thrown from said engine into and upon grass and rubbish which was

¹ From form in *St. Louis & San Francisco Railroad Company v. Shannon*, 25 Okla. 754.

then lying and growing to the north of said gravel-pit, and caused the said grass and rubbish to ignite and burn and the said fire thereupon spread northward and westward toward and to the premises aforesaid. That said fire was occasioned by the carelessness and negligence of the defendant in operating said engine and maintaining it, and the defendant and its agents and servants engaged in the operation and control of said engine carelessly and negligently caused and permitted it to throw coals and sparks of fire into said grass and rubbish and the said coals and sparks of fire ignited the said grass and rubbish. That the said fire spread as aforesaid to said premises and burned all over said premises and burned and destroyed the hay and grass growing thereon and burned and destroyed the soil on said premises to the damage of the plaintiff in the sum of \$. That the same fire burned, injured and destroyed trees growing on said premises to the damage of the plaintiff in the sum of \$. That plaintiff sustained damages by reason of said fire and sustained damages in the total amount of \$., and that there is justly due to the plaintiff from the defendant for the damages occasioned by said fire to said land and said grass and said trees, the sum of \$. No part of said damages has been paid.

The plaintiff therefore prays judgment against defendant for the sum of \$. and interest thereon from the time of filing this petition and costs of suit.²

668. ACTION FOR DAMAGES FOR LOSS BY FIRE ALLEGED TO HAVE BEEN STARTED BY SPARKS FROM A LOCOMOTIVE.

Plaintiff alleges: That the defendants are now and have been continuously for more than the last year past, corporations duly organized, existing and doing business as such during all of said time under and by virtue of law, and during all of said time have owned and operated a railroad extending through M. county, Kansas, and that while operating their said train over said railroad, on or about the day of

² From form in record in Hart v. C. & N. W. Ry. Co., 83 Neb. 652.

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....., 19.., they set out a fire along, upon or near their right of way and railroad at a point, upon, along or near their right of way where the same crosses the northeast quarter section M. county, Kansas, and thereby occasioned and caused the said fire to burn over and destroy (describe property destroyed and value of same), damaging the plaintiff in the reasonable aggregate value or sum of \$....., by reason of the said defendants having set out the said above fire. The said apple trees were set out and growing upon a part of the land burned over by said fire, the same being a part of the tract of land above described, and being a bearing orchard. Said trees, orchard and lands being the property of the plaintiff at that time and has been at all times since.

That the said defendants set out the said fire in the operation of their said trains along said right of way at said time.

That the said plaintiff demanded of the defendants and each of them by written notice and demand, on or about the day of, 19.., payment, for the said damages in the sum of \$.....; but the said defendants and each of them have wholly failed, refused and neglected to pay the same or any part thereof.

That the plaintiff has been reasonably required in the prosecution of this action and occasioned the expense of employing an attorney at law to render services in the prosecution of this action, and that the said services are of the reasonable value of \$.....

Wherefore, the plaintiff prays judgment against the defendants and each of them in the sum of \$....., with interest thereon at the rate of per cent. per annum from the day of, 19.., and that he have and recover of and from the defendants and each of them the sum of \$..... and for his expenses and attorney's fees and expenses as aforesaid, and for the costs of this action.³

³ From form in record in St. L. & S. F. Rd. Co. v. Noland, 75 Kan. 691.

669. ACTION FOR DAMAGES ARISING FROM FIRE ALLEGED TO HAVE BEEN STARTED BY SPARKS FROM A LOCOMOTIVE.

Plaintiff says that defendant's line of railway runs through, over and across the north part of said plaintiff's land described, and that on the day of, 19.., the said defendant, contrary to its duty, and negligently and carelessly, omitted to keep its right of way on plaintiff's land and on the adjoining land clear and clean of dry grass, weeds, and other combustible material, and on the contrary, negligently and carelessly allowed dry grass, weeds and other combustible material to accumulate and remain on said right of way of said defendant's railway and neglected to plow a fire-guard along said line of railway, and on said right-of-way across plaintiff's land, and across the adjoining land, to prevent the spread of fire, or damage therefrom in the operation of its said line of railroad; that on the day of, 19.., the defendant, in operating its line of railway, and running its engines and cars on said line of railway in G. county, Kansas, by and through its servants, employees, and agents, in thereby operating and running said cars and engines thereon, in said county and state, negligently and carelessly permitted said engine of defendant to cast out or emit sparks and coals of fire therefrom, into the dry grass and weeds and other combustible material on defendant's right-of-way, thereby setting out fire and setting fire thereto, and carelessly and negligently allowing the fire thus set out on defendant's right-of-way to escape and spread therefrom to other lands, and finally to plaintiff's land and meadow, thereby burning and injuring plaintiff's meadow, greatly damaging plaintiff, in the sum of dollars per acre, or the total sum of dollars, and without any fault or negligence on the part of this plaintiff on account of said fire.

Wherefore, plaintiff asks judgment against defendant in the just sum of dollars and costs of suit, and for dollars attorney fees, and all other proper relief.⁴

⁴ Form in *Fort Scott, Wichita & Western Ry. Co. v. Tubbs*, 47 Kan. 630.

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670. ACTION FOR DAMAGES RESULTING FROM FIRE SET BY LOCOMOTIVE.

Plaintiff complains of defendant and alleges:

That this plaintiff, on the day of, 19.., and for a long time prior thereto, was the owner of, and possessed of the following described lands, to-wit: (here describe), upon which said lands there were growing and standing large and valuable trees, shrubs, vines, apples, rick of straw, as follow, to-wit: (here set out), consisting of trees, vines, bushes, apples and straw, were the property of this plaintiff, and were of the aggregate value of dollars.

Plaintiff says that on or about the day of, 19.., the said defendant was operating its said railroad hereinbefore mentioned, and did run a large passenger train, No. .., drawn by locomotive engine, numbered, along and over said railroad in county, Kansas, and when said passenger train, and locomotive or engine, was passing through and over said (here describe) at about o'clock m. of that day near to this plaintiff's land, said defendant, carelessly, negligently, and unlawfully permitted large flames and sparks of fire and live cinders to escape from its said locomotive or engine, by carelessly, negligently and unlawfully failing to provide, and have sufficient safety screens or spark arresters attached to its said engine to prevent fire and sparks from escaping from its said locomotive or engine, and, by reason of the said defendant's negligent, unlawful and careless manner, in which it was operating said railroad, the grass beside said line of railroad, and on said defendant's right of way became, and was, ignited by and from sparks and coals of fire emitted and thrown from its said locomotive or engine.

Plaintiff says that the said defendant carelessly, negligently, and unlawfully permitted tall grass and weeds, and a large amount of combustible material to grow, be, and remain on the right of way of the said railroad company, and by reason of said defendant's said careless, negligent, and unlawful manner of operating said railroad by failing to provide sufficient safety screens and spark arresters for its said engine or

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locomotive, and permitting said grass, weeds and combustible material to grow, be, and remain on its said right of way, it permitted fire and sparks to escape from its said locomotive or engine, and which said fire and sparks, so escaping or thrown, or permitted to escape, or be thrown from its said locomotive or engine, the grass, weeds, rubbish and combustible material so carelessly, negligently and unlawfully permitted to be and remain along by, and adjacent to, said line of railroad, became and was ignited; and the said defendant carelessly, negligently and unlawfully permitted said fire to spread and communicate to the premises of this plaintiff, and which said fire burned and destroyed the apple trees, budded peach trees, seedling peach trees, walnut trees, cherry and plum trees, hedge fences, gooseberry bushes, grape vines, blackberry vines or bushes, apples and straw hereinbefore set forth, and the property of this plaintiff to her damage in the sum of dollars.⁵

671. ALLEGATIONS OF NEGLIGENCE, FIRST, IN PERMITTING COMBUSTIBLE SHEDS AND BUILDINGS ON RIGHT OF WAY, SECOND, INCOMPETENT AND UNSKILLFUL AGENTS IN CHARGE OF LOCOMOTIVES, AND THIRD, FAILURE TO SUPPLY SUITABLE SPARK ARRESTERS.

Plaintiff alleges that on the day of, 19.., in said city of E., county and state, said defendant railway company, contrary to its duty in that regard, by itself and its agents and servants, carelessly and negligently failed to have and keep its grounds and right of way in said city free and clear from dry and combustible materials, and carelessly and negligently permitted dry and combustible wooden sheds and wooden buildings with wooden roofs to be and remain upon its said grounds and right of way close to its railroad tracks, and where they were liable to and would be ignited by sparks and fire from its engines.

That each and every engineer and engineers, the fireman and the firemen of the engine and engines of the defendant railway company which started said fire were, at

⁵ Sustained against demurrer in Missouri, Kansas and Texas Ry. Co. v. Lyan, 57 Kan. 635-638.

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and about the time of its starting, and for a long time prior thereto had been, habitually incompetent, inexperienced, unskillful, negligent and careless, of each and all of which said defendant railway company at all of said times had notice and knowledge; that at the time when said fire was started said engineer and engineers, fireman and firemen, by reason of such incompetence, inexperience, unskillfulness, negligence, and carelessness, ran, operated and handled such engine and engines in an unskillful, incompetent, improper, negligent and careless manner and by reason thereof said fire was started.

And that none of the engines of said defendant railway company which was used and operated on said railroad at said place, at and about the time of the setting out and communicating of said fire, was supplied with suitable and safe spark-arresters and netting, in good order and safe condition, but plaintiff is unable to allege more specifically the particular engines in question, or the details of the unsuitableness and lack of safe condition, design and order of said spark-arresters and netting.

That at said time and place, in the operation by said defendant railway company of its said railroad, one or more of the engines used and operated by the defendant railway company, by itself and its agents and servants, set out and communicated fire; that said fire was caused by the operation of said railroad and was set out and communicated by reason and as the result of each and every of the particular acts, conduct, omissions and defaults of and in the carelessness and negligence of said defendant railway company, and of its agents and servants, as hereinbefore stated; that said fire ignited and burned the wooden sheds and wooden buildings with wooden roofs hereinbefore referred to, upon the grounds and right of way of the defendant railway company, and spread and communicated continuously and forthwith to the said premises of the plaintiff, and his real and personal property situated thereon.⁶

⁶ Form in *Sprague v. Atchison, Topeka and Santa Fe Ry. Co.*, 70 Kan. 359.

Damages by fire, statutory provisions. Gen. Stat. of Kan. 1909, sec. 7079.

672. ALLEGATION OF NEGLIGENCE IN ACTION FOR DAMAGES CAUSED BY FIRE SET BY LOCOMOTIVE.

That said company, on the day of, 19..., while running one of its passenger trains southwesterly on said road, in said county, managed its said train so carelessly and negligently, and failed to employ suitable means to prevent the escape of fire from the engine that was running or pulling said train, so that by reason of its carelessness and negligence aforesaid, fire escaped from the engine of said company and set fire to the dry grass and other material on its right of way, and by reason of a continuous body of dry grass

It is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway, to make out a *prima facie* case. Fort Scott, W. & W. Ry. Co. v. Tubbs, 47 Kan. 630.

The rule prescribed by the statute, that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company, applies to all cases where the fire results from any step in the operation of the road; and the coupling of a charge of negligence in allowing combustible material to accumulate on the roadway, with one that the fire was negligently permitted to escape from a passing locomotive will not take the case outside of the application of the statute. Mo. Pac. Ry. Co. v. Merrill, 40 Kan. 404.

In an action against a railway company to recover damages resulting from fire which was negligently permitted to escape from a passing locomotive and train, the plaintiff should state in his petition as definitely as he can the train from which, and the time when, the fire escaped. Mo. Pac. Ry. Co. v. Merrill, 40 Kan. 404.

An allegation that the defendant, by and through its agents and employees in the use of the engine from which fire escaped and destroyed plaintiff's property, was careless and negligent in the operation of its railway, is not sufficient to support a finding of negligence in the use of a defective spark arrester. Missouri, K. & T. Ry. Co. v. Garrison, 66 Kan. 625.

In an action against a railroad company to recover damages by a fire communicated while the defendant was operating its railroad, where the only fault charged is that "the defendant so carelessly and negligently managed and controlled its locomotive and train that fire escaped therefrom," and the plaintiff proved the setting out of the fire by the defendant's locomotive, it did not then devolve upon the defendant to prove that the locomotive was sufficient and in good condition and repair, but only that it was carefully and properly managed and controlled. Atchison, Topeka & Santa Fe R. R. v. Ayers, 56 Kan. 176.

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and other material, and without any fault of plaintiff, it was communicated to the leased premises in possession of plaintiff.⁷

673. ALLEGATIONS OF NEGLIGENCE IN AN ACTION FOR DAMAGES CAUSED BY FIRE SET BY SPARKS FROM A LOCOMOTIVE.

That on the day of, 19..., said defendant controlled and operated a certain railway known as the C., K. & N. railway, with the track, cars, locomotives and other appurtenances thereunto belonging, which said railway runs in and through K. county, in this state. That on or about the day of, 19..., said defendant, its agents, servants and employees, in the operation of and the running of its trains on its said railway, negligently and carelessly permitted its locomotive to emit sparks and fire into the dry grass and weeds along the right-of-way, and the land adjoining thereto, at or near the town of M., in said K. county, which said sparks and fire ignited and set fire to the prairie grass and weeds along said right-of-way and the adjoining lands; which said fire so started as aforesaid, spread and burned continuously to and over the plaintiff's premises above described, burning the grass on plaintiff's said lands, and in her said pasture, thereby destroying plaintiff's grazing lands and damaging plaintiff's fence by burning the posts and wire thereof; and burning tons, or thereabouts, of plaintiff's hay in the stack, and burning and killing the said timber and young trees standing and growing along and near the said K. creek.⁸

674. ALLEGATION OF NEGLIGENCE IN AN ACTION FOR DAMAGES CAUSED BY THE ESCAPE OF FIRE FROM A LOCOMOTIVE.

That the defendant managed its train carelessly and negligently and failed to employ suitable means to prevent the escape of fire from the engine that was attached to and drawing

⁷ Missouri, Kansas and Texas Ry. Co. v. Traxon, 77 Kan. 821. A motion to make this bill of particulars more definite and certain, requiring the giving of the number of the engine, was overruled.

⁸ Chicago, Rock Island & Pacific Ry. Co. v. McBride, 54 Kan. 172.

said train, and also carelessly and negligently permitted dead and dry grass, weeds, stubble and other combustible materials to remain on the right of way of said defendant company, and within feet adjacent to its said track, so that by reason of its carelessness and negligence as aforesaid and without the fault of these plaintiffs, fire escaped from said engine of said company and set fire to the dead and dry grass, weeds and stubble and other combustible materials on its right of way, and by reason of a continuous body of dead and dry grass, weeds, and other combustible materials, and without the fault of these plaintiffs, said fire was communicated to the premises of these plaintiffs.⁹

675. ALLEGATIONS OF NEGLIGENCE IN ACTION FOR DAMAGES CAUSED BY FIRE ESCAPING FROM A RIGHT OF WAY WHILE BURNING DRY GRASS THEREON.

That the said defendant, its agents and servants, while operating its said railroad, negligently and carelessly set fire to the dry grass, weeds, and other combustible material along its right-of-way aforesaid, and negligently and carelessly permitted the said fire to escape over and upon said farm owned by plaintiff, where it continued to burn and consume rails worth dollars, being the property of said plaintiff on said farm; that it also burned and consumed rods of hedge fence, one-half of which was owned by the plaintiff, and of the value of dollars, and being standing on said land; that it also consumed bushels of corn, of the value of dollars, said corn being upon the said lands, and the property of plaintiff. That by reason of the negligence and carelessness of the said defendant as aforesaid, the plaintiff has been damaged in the sum of dollars.

The plaintiff further alleges that he was compelled to procure an attorney to bring and prosecute this suit for him, and that dollars is a reasonable fee for the plaintiff's attorney for the bringing and prosecuting of this action.¹⁰

⁹ Held sufficient in *Buck v. Union Pacific Ry. Co.*, 59 Kan. 328.

¹⁰ Form in *Mo. Pac. Ry. Co. v. Cady*, 44 Kan. 633.

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676. ALLEGATION OF PLAINTIFF AND PRAYER ASKING ATTORNEY FEE, IN CASES OF DAMAGES CAUSED BY FIRE SET BY RAILROAD COMPANY.

Plaintiff states that it is necessary for him to employ an attorney to prosecute his suit against the defendant to recover damages which he has sustained and states that he has employed an attorney so to do and to file the petition in this case and prosecute the same and take such other steps as are necessary in the prosecution of this suit and that his services are reasonably worth the sum of dollars.

Wherefore he asks for judgment for attorney's fees for the sum of dollars, in addition to damages sustained by reason of the loss as set out in this petition.¹¹

677. ACTION AGAINST A RAILROAD COMPANY FOR DAMAGES FOR KILLING STOCK ALLEGING DEFECTIVE AND INSUFFICIENT FENCES.

The plaintiff for cause of action against the defendant alleges:

The defendant is a corporation operating a line of railroad in said county and state.

On or about the day of, 19.., at a point near or on section, in township, north in range west, in said county, defendant willfully, negligently and carelessly ran an engine and train of cars against one bay

¹¹ Adapted from form in *St. Louis and San Francisco Ry. Co. v. Snaveley*, 47 Kan. 637.

Form of petition in action for damages alleged to have been caused by fire set by sparks escaping from a locomotive. *St. Louis & S. F. Ry. Co. v. Snaveley*, 47 Kan. 637.

Form of petition in action for damages for loss of young trees destroyed by fire set by sparks from a locomotive. *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70.

Allegations in action for damages for loss of buildings alleged to have been burned by fire set by locomotive. *Union Pac. Ry. Co. v. Keller*, 36 Neb. 189.

Form of petition in action by owner of land against a railroad company for damages for entering upon his land and constructing a railroad. *Chicago, K. & W. Ry. Co. v. Abbott*, 44 Kan. 170.

Action against a railroad company to recover statutory penalty for receiving and transporting game. *Comp. Laws Okla. 1909, sec. 511*; *Chicago, R. I. & P. Ry. Co. v. Ty. of Okla.*, 25 Okla. 238.

mare, three years old, of the value of dollars, and one brown horse, two years old, of the value of dollars, the personal property of the plaintiff, whereby they were fatally injured and were killed by defendant's employees.

At said point the right of way of the defendant was fenced, but the fences and gates were allowed to be and were in a bad state of repair, and were so maintained that horses and cattle could go upon said right of way; that plaintiff's said horses went upon said right of way by reason of the condition of said fences and gates being in said state, the same being at a place where by law said track was required to be fenced and said road having been operated for more than six months before the wrongs complained of.

The plaintiff demanded of defendant compensation for said stock, but defendant refused to pay the same, to the damage of the plaintiff in the sum of \$.....

Whereof plaintiff prays judgment against the defendant for the said sum of \$....., with interest and costs of suit.¹²

678. ACTION FOR DAMAGES FOR VALUE OF STOCK KILLED BY RAILROAD COMPANY ON ITS RIGHT OF WAY.

Plaintiff states:

1. That at all of the times hereinafter mentioned, the said defendant was and still is a corporation, duly and legally incorporated as a railway corporation, and operating a railway from the east line of the county of J., in the State of Kansas, over, across and through said county of J. and State of Kansas, to a point on the west line thereof; and on or about the day of, 19.., and ever since has controlled, operated and managed said railway, with certain locomotives and cars thereon; that said defendant, at said time, at a point where its said railway crosses a public highway which is known as the "P. road," between section in township of range; and section, in Tp., range, in said county of J. and State of Kansas, had neglected and failed to construct or maintain a cattle

¹² From form in record in *Fee v. Chicago, Burlington & Quincy Railway Company*, 83 Neb. 307.

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guard where said public highway crosses the railway of said defendant, sufficient to prevent domestic animals from passing from said highway over and upon the tracks and right of way of said railway company, and had thereby failed to enclose its said railway with a good and lawful fence, sufficient to prevent domestic animals from going and being on such railway; that on said day of, 19.., the said plaintiff owned and was possessed of the following horses and mules, to-wit: (describe property, giving value of each). All of the aggregate value of \$.; which horses and mules then and there by reason of the neglect and omission of said defendant to construct and maintain said cattle guard and to enclose its said railway at that point with a good and sufficient fence to prevent domestic animals from going upon its said railway, and where said railway might properly have been securely fenced, and without any fault or negligence on the part of this plaintiff, strayed from said public highway over and upon the track and line of said railway; and were thereafter, on or about the said day of, 19.., in said county of J. and State of Kansas, run against and killed by a locomotive and cars operated and managed by defendant's servants, to the damage of the said plaintiff in the said sum of dollars; that thereafter, to-wit; on , 19.., the said plaintiff duly demanded of and from said defendant, pay for the value of said horses and mules so killed by it, and aforesaid, by serving and delivering to H. B. B., who was then and there ticket agent and station agent of said defendant at its station at M., Kansas, a written demand, which demand was in the words and figures following, to-wit:

“To H. B. B., station agent at M., Kansas, of the M. P. Ry. Co., and to the M. P. Ry. Co., I, the undersigned, hereby demand of said company and its said station agent, the sum of dollars as payment for the value of three head of mules and one two year horse or colt, all owned by me and killed on or about the day of, 19.., by the engine and cars of said Ry. Co. in operating its line of railway. Said stock were so killed between W. and M. stations.

“O. E. O.”

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Plaintiff further alleges that the said defendant failed and refused to comply with said demand, or any part thereof; that more than thirty days have elapsed since said demand was made, and that the said defendant still fails and refuses to comply with said demand, or any part thereof.

Plaintiff further alleges that it is necessary for him to employ the services of attorneys to bring this suit, and that a reasonable attorney's fee for the services of such attorneys for the prosecution of this suit is the sum of dollars.

Wherefore, the causes aforesaid, the said plaintiff prays judgment against the said defendant for the sum of dollars, and for the costs of this action.¹³

679. ACTION FOR DAMAGES AGAINST RAILROAD COMPANY FOR KILLING STOCK, ALLEGING FAILURE TO FENCE TRACK.

1. The plaintiff complains of the defendant for that said defendant is a corporation doing business under the laws of the State of Nebraska.

2. That on or about the day of, 19.., said defendant was operating a railroad through S. county, said road having been open for use for more than six months in said county; that while so operating the same at the time above stated, at a place near P. on said road, where the defendant is required by law to fence its track, but had failed to do so, said defendant, by its agents and employees, ran an engine over and against black stallion known as "D," by reason of which said stallion was injured so that he died next day.

3. The said stallion was the property of this plaintiff, and was of the value of dollars.

4. Plaintiff further says that defendant had not fenced its said track at this point, nor provided the same with cattle guards as required by law.

5. That immediately after said stallion was injured as aforesaid plaintiff notified defendant of the same; and plaintiff has frequently since requested the defendant to pay the

¹³ From form in record in Mo. Pac. Ry. Co. v. Olden, 72 Kan. 110.

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damages which he has sustained by reason of the killing of said stallion as aforesaid, but defendant has refused so to do; and plaintiff further says that his damages sustained as aforesaid are dollars, no part of which has been paid.

Wherefore, etc.¹⁴

630. ACTION TO RECOVER DAMAGES FOR KILLING AND INJURING PLAINTIFF'S HORSES ON DEFENDANT'S RIGHT OF WAY ALLEGING NEGLIGENCE IN MAINTAINING INSUFFICIENT GATE AND IN FRIGHTENING HORSES.

The plaintiff complains of the defendant, for that said defendant is a corporation organized under the laws of the State of Nebraska; that on or about the day of, 19.., the defendant was operating a railroad through S. county, said road being opened for use and used for more than six months in said county; that said railroad of defendant runs through plaintiff's land on which he lives; that the line of road through the plaintiff's land is fenced, and is fenced for more than half a mile southwest on an adjoining piece of a large draw where there is a bridge of at least feet in length, on which said road is built; that said bridge is not planked on the ties, but is left open, and the fence of said defendant's road runs up to and is fastened to the northeast end of said bridge, said bridge being from to feet high from the ties to the ground; that the defendant when it fenced said road through plaintiff's land put in a gate on plaintiff's land to enable him to cross over its track from one side of his farm to the other, but said gate and fence were so poorly made and improperly constructed, with no fastenings of any kind to prevent the wind from blowing it open, and said defendant negligently and carelessly suffered and permitted the said gate and fence to be out of repair, and all of which facts the defendant had due notice, and negligently failed and neglected to repair, fix, fasten, and properly construct the same; that at the date last aforesaid the plaintiff's horses, grazing in plaintiff's pasture on the land aforesaid adjoining defendant's track, passed through the aforesaid de-

¹⁴ Form in Chicago, Burlington & Quincy R. R. Co. v. Hildebrand, 42 Neb. 33.

fectively constructed and insufficiently secured gate upon the right of way of defendant, and the defendant while so operating its road as aforesaid, by its passenger train going southwest at the time and place aforesaid, by its agents and servants so running said passenger train as aforesaid, saw said plaintiff's horses upon its right of way and roadbed of defendant close to the northeast end of the aforesaid bridge; that said train was stopped about feet before reaching the bridge; that at the time said train stopped, the section men of defendant were endeavoring to drive said horses from the bridge toward and past the engine and passenger coaches, and before said horses could be driven up to and past said engine and cars aforesaid the defendant, by its servants and employees, negligently and carelessly started said engine and cars aforesaid without giving said section men time to get said horses past said engine and cars aforesaid, two of said horses being already scared and frightened were, by the carelessness and negligence of the defendant in starting its engine and cars aforesaid, driven into said bridge, whereby one of said horses was so injured that it died, and the other was greatly injured and damaged, to the plaintiff's damage of dollars.

Wherefore the plaintiff demands judgment for the sum of dollars and costs of this suit.¹⁵

¹⁵ Form in *Fremont, Elkhorn & Missouri Valley R. R. v. Pounder*, 36 Neb. 247.

Damages to stock—statutory provisions. Gen. Stat. of Kan. 1909, sec. 7001 *et seq.*; Comp. Laws of Okla. 1909, secs. 1389–1392.

The statute making railroad companies liable for injuries to stock upon their failure to maintain fences along the right-of-way and cattle-guards at highway crossings was not intended to provide a penalty for failure to maintain such safeguards, but merely to render such companies liable to the owner of stock injured in consequence of such failure. *Chicago, B. & Q. Ry. Co. v. King*, 76 Neb. 591.

An allegation of gross negligence on the part of the defendant is unnecessary, in a bill of particulars which discloses no negligence on the part of the plaintiff, filed in an action to recover damages for stock killed by a railroad train. *Central Branch R. R. Co. v. Phillipi*, 20 Kan. 9.

In Oklahoma an action for damages against a railroad company for injuries sustained by cattle upon the right-of-way of such railroad

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681. ALLEGATIONS THAT DEFENDANT ASSUMED CONTROL OF LINE OF RAILWAY AND BECAME LIABLE FOR DAMAGES.

Plaintiff states that before the commencement of this action, the A., T. & S. F. R. Co., by some arrangement, the date and exact nature of which is to plaintiff unknown, assumed con-

company is founded upon statute, and upon specific conditions, and the conditions must be shown in the pleading and appear in the evidence in order to entitle plaintiff to recover. *McCook v. Bryan*, 4 Okla. 488.

A petition for damages for the loss of stock based on the provision of the statute, which contains no allegation tracing such loss to the failure of the railroad company to maintain fences or cattle-guards, is fatally defective. *Chicago, B. & Q. Ry. Co. v. King*, 76 Neb. 591.

An allegation that a railroad was not securely fenced will be held to mean that it was not inclosed with a good and lawful fence. *Mo. Pac. Ry. Co. v. Morrow*, 36 Kan. 495.

Allegation that railroad was not properly inclosed with fence, held sufficient in *Kansas City, L. & S. R. Co. v. Neville*, 25 Kan. 440.

A party in an action against a railroad company to recover the value of stock killed by the engine and cars of said company, may allege in his petition that the injury was caused by the negligence of the employees in the management of the engine and cars, and also facts showing a cause of action under the statute, and on the trial may prove either or both, and recover accordingly. *Stewart v. M. A. & B. Ry. Co.*, 27 Kan. 631; *Kansas City, Ft. S. & G. Ry. Co. v. Hines*, 32 Kan. 619.

Action must be brought in county where stock were killed or injured and the petition must so allege, where it is brought under the statute. *Kansas City, Ft. S. & G. Ry. Co. v. Burge*, 40 Kan. 734; *St. Louis & S. F. Co. v. Byron*, 24 Kan. 255; *Hadley v. Central Branch U. P. R. Co.*, 22 Kan. 255.

Pleadings in particular case which sufficiently show that the accident occurred in the county where the action was brought. *Wichita & Colorado Ry. Co. v. Gibbs*, 47 Kan. 274; *St. Louis & S. F. Ry. Co. v. Dudgeon*, 28 Kan. 201.

Demand for damages for killing stock made on station agent held sufficient. *Union Pac. Ry. Co. v. Shelley*, 49 Kan. 667; *St. Louis & S. F. Ry. Co. v. Kinman*, 49 Kan. 627.

A demand made upon the general superintendent of a railway company is a sufficient demand upon the company. *Central Branch R. R. Co. v. Ingram*, 20 Kan. 66.

To recover an attorney's fee under the railroad stock law, it is not essential that the plaintiff should state in his pleading that the employment of an attorney in the case was necessary. A full statement of the facts concerning the injury, and a prayer for an attorney's fee,

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trol of said line of railway, and, by written contract, agreed to become, and did become, liable for killing said stock of plaintiff, to the same effect that the S. K. R. Co. is liable; that the plaintiff cannot set out a copy of said written agreement, for the reason that it is not now and never has been in the possession or under the control of the plaintiff.¹⁶

682. ACTION AGAINST A RAILROAD COMPANY FOR DAMAGES FOR OBSTRUCTING THE MEANS OF ACCESS TO PLAINTIFF'S PROPERTY BY BUILDING A RAILROAD IN THE STREET IN FRONT OF HIS PROPERTY.

(Allege incorporation and business of railroads.)

Plaintiff states that he is now, and for the past years has been continuously, the owner of and in possession of the following described real estate, to-wit: (here describe); that immediately to the west of the plaintiff's said property, and along the west end of said property, and adjoining thereto, there was for many years prior to about the day of, 19.., a street, avenue and public thoroughfare of the said city of N., known and designated as avenue, running north and south; that said K. avenue had for many years prior to said day of, 19.., been dedicated and set apart to the use of the public, and to the especial use of the adjoining lot-owners, as a public street and highway, and had been established as a public highway prior to said date, and had been used as a public highway continuously and constantly for more than years prior to said day of, 19..; that the said avenue was the only way by which plaintiff will sustain such a recovery. *Kansas City, Ft. S. & G. Ry. Co. v. Burge*, 40 Kan. 736.

The stock law of 1874 makes provision for the recovery of a reasonable attorney's fee for the prosecution of a suit for damages for injuring or killing stock in the operation of railroads; therefore there is less reason for favoring insufficient and defective complaints in those actions, than in the ordinary cases commenced in justices' courts. *St. Louis & S. F. Co. v. Byron*, 24 Kan. 255.

Amendment of petition allowed after lapse of time was held properly allowed and that it did not constitute separate cause of action. *St. Louis & S. F. Ry. Co. v. Ludlum*, 63 Kan. 719.

¹⁶ Form in *Atchison, Topeka & Santa Fe R. R. Co. v. Bell*, 52 Kan. 134.

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which the said plaintiff could have ingress and egress to and from his said premises from the west end thereof; that on or about the said day of, 19.., the said defendant, the St. L., F. S. and W. R. R. Co., obstructed the said avenue in front of the plaintiff's said premises, by digging ditches and trenches, and laying down and building its main line and side tracks therein; which consist of iron rails and cross-ties placed and constructed along said avenue, forming what is known as a standard-gauge locomotive steam railroad track; that said defendant, the St. L., F. S. & W. R. R. Co., at the time of obstructing said street as aforesaid, lowered the established grade of said avenue by its trenches and ditches from to feet, and on said, 19.., so constructed its tracks in front of the plaintiff's premises on said avenue, and so obstructed said avenue in the manner aforesaid, as to wholly impair and destroy said avenue and render it wholly useless as a public highway; and by such obstruction the plaintiff has been deprived of all means of ingress and egress to and from his said premises from the west end thereof; that the obstruction of said street and avenue as aforesaid was necessary for the proper and skillful construction of said railroad, and said railroad was at the time and in the manner aforesaid skillfully and properly constructed; that the defendant, the St. L., F. S. & W. R. R. Co., at the time aforesaid, appropriated said street and avenue in front of the plaintiff's premises for the use of its said railroad by virtue of its right of eminent domain, but without any condemnation proceedings therefor; that after appropriating said avenue as aforesaid, said defendant, the St. L., F. S. & W. R. R. Co., continued to occupy the same with its tracks, and continued to operate its road upon and along said avenue in front of the plaintiff's premises by running its cars, engines and trains thereon, until about the day of, 19..; that on or about the day of, 19.., a receiver was appointed over the railroad so owned and operated by the said St. L., F. S. & W. R. R. Co. by the circuit court of the United States for the district of Kansas, in an action then pending in the said cir-

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cuit court for the foreclosure of first-mortgage bonds of said railroad, wherein the U. T. C. of the State of N. Y. was plaintiff, and the St. L., F. S. & W. R. R. Co. was defendant; that under and by virtue of an order of sale of said circuit court in said action, said railroad with all its property was sold on the day of, 19..; that on or about the day of, 19.., the defendant, the F. S., W. & W. R. R. Co., purchased and acquired the said railroad formerly known as the St. L., F. S. & W. R. R. Co., and on or about the day of, 19.., took possession of said railroad, and of the tracks in the said avenue in front of the plaintiff's premises above described, and has ever since so taking possession of said railroad continued to operate and still continues to operate the same upon and along said K. avenue in front of the plaintiff's said premises; that said railroad tracks have, since they were first constructed upon and along said K. avenue, remained in the same condition and position in which they were first constructed, and are now in the same condition; that the defendant, the F. S., W. & W. R. R. Co., has permanently appropriated said K. avenue along and in front of plaintiff's said premises, to its own use, for the purpose of operating said railroad; that by the permanent appropriation of the said K. avenue as aforesaid, the plaintiff has been permanently deprived of all means of ingress and egress to and from his said premises from the west end thereof; and by said appropriation said K. avenue has been entirely destroyed as a public highway; that the defendant, the F. S., W. & W. R. R. Co., has never condemned the plaintiff's right in said avenue, nor has any proceeding been had for the condemnation of the same; that on the sale made by order of the United States court as aforesaid, there were only sufficient proceeds realized for the payment of the first mortgage bonds of the said railroad, leaving numerous other mortgage bondholders, judgment creditors and claimants wholly unpaid; that the plaintiff has never been paid or received any compensation whatever on account of his damages, by reason of the appropriation of said avenue as aforesaid; that the defendant, the St. L., F. S. & W. R. R. Co., is

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wholly insolvent, and has ceased to do business; and that by reason of the permanent appropriation of the said avenue as aforesaid, the plaintiff has been damaged in the sum of dollars.

Wherefore, the plaintiff prays judgment against the said defendants and each of them for the said sum of dollars, with interest thereon at the rate of per cent. per annum from the day of, 19.., and for the costs of this action, and for such other and further relief as in equity and in justice the plaintiff is entitled to.¹⁷

683. ACTION FOR DAMAGES FOR BREACH OF CONTRACT TO GIVE PLAINTIFF PASS OVER ROAD, IN CONSIDERATION OF GIVING RIGHT OF WAY.

The plaintiff says that the defendant is and at all times hereinafter mentioned was a corporation organized under the laws of Kansas, and doing business as a common carrier; that the W. & S. company is and at all times hereinafter mentioned was a corporation organized under the laws of Kansas; that on or about the day of, 19.., and before the defendant entered into a written contract with the W. S. R. R. Co., whereby the defendant leased the road-bed, depot grounds, side track and rolling stock, and agreed and bound itself to operate the W. & S. R. R.; that one T. J. P. was the agent and general manager of the defendant, and in the matter and things hereinafter set out was the agent for said W. & S. Ry. Co.; that this plaintiff, at the instance and request of said T. J. P. while so acting for and on behalf of defendant and said W. & S. Ry. Co., made, executed and delivered to the W. & S. Ry. Co. his written conveyance, a copy of which is here annexed, marked "A," and made a part of this petition, whereby he conveyed to the W. & S. Ry. Co., its successors and assigns, the rights, privileges and easement to construct a depot and side track, situated in the county of S. and State of Kansas, on the land described as follows, viz: (here describe). a copy of which is hereto attached, marked "A"; that the consideration of the said conveyance was, that this plaintiff should

¹⁷ Form in Fort Scott. Wichita & Western R. R. v. Fox, 42 Kan. 490.

have a life pass, by which he should at all times have the right and privilege, at any and all times he chose so to do, to ride on any of the trains of said defendant; that said consideration was promised and made by said T. J. P. for and on behalf of defendant, and while so acting for it as its agent in that behalf; that defendant immediately thereafter entered into and upon said real estate, and has at all times held, used and occupied the same, and has in all things satisfied and confirmed the action of said T. J. P. therein.

This plaintiff further avers that the defendant did, for a long time and up to and including the year 19.., carry out in good faith its agreement, and did issue and deliver to this plaintiff annually its certain annual ticket or pass in writing, whereby it authorized and permitted this plaintiff to ride on any of its trains, which pass on its face in writing stated that it was "issued on account of depot grounds."

This plaintiff further avers that the defendant, notwithstanding its promise and agreement so to do, has since the year ending, 19.., and still does refuse to issue or deliver to plaintiff any pass to allow plaintiff to ride on defendant's train or any of them unless he will agree to pay it for the privilege so to do; that by reason of its so refusing this plaintiff permission to ride on its trains as aforesaid, and by reason of the premises herein set out, the plaintiff has been damaged in the sum of dollars, for which he demands judgment and costs of suit.¹⁸

¹⁸ Form in *Atchison, Topeka & Santa Fe R. R. v. English*, 38 Kan. 110.

Form of answer in action for damages by land owner against a railroad company for entering upon the land and constructing a railroad, setting up as a defense condemnation proceedings by which land was condemned. *Chicago, K. & W. Ry. Co. v. Abbott*, 44 Kan. 170.

Contributory negligence is not a defense in an action brought under section 5859 of the Gen. Stat. of Kan. of 1901 against a railway corporation to recover the value of stock killed by the engine or cars of the company operating such railway, where the road is unfenced, or where the fence is so defective as to permit stock to pass upon the right of way. *Railway v. Paxton*, 75 Kan. 197.

A defense is not defective merely because it fails to allege that the defendant was itself free from all fault and negligence. The defend-

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ant's fault or negligence is matter to be shown by the other party.
Central Branch U. P. R. Co. v. Walters, 24 Kan. 361.

In an action for damages caused by fire started from sparks from a locomotive setting fire to sheds on the right of way of the company, it is no defense for the company to allege the leasing of said property on which the sheds were located to another party. Sprague v. Atchison, Topeka and Santa Fe Ry. Co., 70 Kan. 359.

CHAPTER LV.

RECEIVERS.

- 684. Application by the attorney general for the appointment of a receiver for a state bank alleged to be insolvent.
- 685. Action by stockholders praying for the appointment of a receiver, alleging insolvency.
- 686. Action at instance of attorney general for the appointment of a receiver for a state bank.
- 687. Application for a receiver in suit instituted for purpose of foreclosing a mortgage on real estate.
- 688. Action by one member of a partnership asking for appointment of a receiver.
- 689. Action by stockholders for the appointment of a receiver for a defunct corporation for the purpose of collecting unpaid subscriptions from shareholders, alleging insolvency of the corporation.
- 690. Notice of application for a receiver.

684. APPLICATION BY THE ATTORNEY GENERAL FOR THE APPOINTMENT OF A RECEIVER FOR A STATE BANK ALLEGED TO BE INSOLVENT.

The attorney general respectfully represents to the court:

1. That the defendant C. S. Bank is a corporation duly organized under and by virtue of the laws of this state.
2. That the defendant J. F. McC. is the president of the defendant bank.
3. That the defendant G. W. S. is the sheriff of Y. county.
4. That the following named persons are creditors of said bank, and have money deposited therein in the sums set opposite their respective names: (here set out).

That the following named persons have sums of money deposited in said bank which in the aggregate amount to dollars, to-wit: (here set out).

5. That the defendant McC., on the day of, 19.., being, as he alleges, insolvent, made an assignment for the benefit of his creditors, and the defendant S., as sheriff

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of Y. county, has taken possession of all the estate of the defendant McC., and by the direction of the officers of the defendant bank, who claim that the defendant McC. is the sole owner thereof, the sheriff has closed the doors of said bank, taken possession of all its assets, and claims to hold the same by virtue of his office as assignee of said alleged insolvent.

6. That at all times since the commencement of business by defendant bank, it has been conducted as a corporation, its articles of incorporation have been duly filed in the office of the county clerk of Y. county, and a copy thereof in the office of secretary of state.

7. That it has been made to appear to the auditor of public accounts and the attorney general that the manner in which the defendant is conducting its business is unsafe and unauthorized, and is jeopardizing the interest of its depositors, and that it is unsafe and inexpedient for such corporation to continue to further transact business. Reference is hereby made to the affidavits hereto attached as "exhibits G and H" and the report of said bank made, 19.., marked "exhibit A."

8. That the defendant McC. is indebted in much larger amounts than he can pay in full, and has been insolvent for a long period of time, but the assets of said bank are not large enough, together with the individual assets of the defendant McC., to pay more than per cent. of the liabilities of the defendant bank and the defendant McC.; and the interests of depositors will be without protection unless this court appoint a receiver to wind up the business of the defendant bank.

9. That if the affairs of said bank are properly managed, and its business wound up in accordance with the law under which it has been conducting a banking business, its depositors and all of its creditors may be paid in full, as its assets are in excess of its liabilities.

10. That all of the persons whose names are mentioned in the body of this petition as depositors in said bank have made demand upon the officers of said bank for the payment of the amounts severally due them, and payment thereof has been

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by them refused; that the officers of said bank declare that no more payments will be made by the defendant bank; that the sheriff, who now holds possession of its assets, intends to distribute the same among all of the creditors of the defendant McC. pro rata only; and the sheriff now holds possession of said assets, and will so administer said assets unless he be ordered to turn the same over to a receiver to be appointed by this court.

11. That on, the day of, 19.., the president of the defendant bank, at the time when he was contemplating insolvency, and knowing that he was insolvent, received from S. J. L., one of the depositors above mentioned, a deposit of money amounting to the sum of dollars, knowing that he, the said president, was insolvent and contemplated making an assignment for the benefit of his creditors, and on said day the said defendant issued his check on said bank, which was paid after banking hours on said day, all of which was done in contemplation of insolvency, and with intent to defraud creditors of said bank.

12. The plaintiff therefore prays that the sheriff of said county be ordered to list the assets of the defendant bank, to report the same to this court, and to turn the same over to such person as this court may direct; that this court will appoint a receiver, who may be by the court ordered and directed to take charge of the assets of the defendant bank, with directions to wind up the affairs of said bank in accordance with law, and for such relief as may be just and equitable; that the defendant McC. may be ordered to show cause, if he has any, why the court may not appoint a receiver as herein prayed for.¹

¹ Form in *State v. Commercial State Bank*, 28 Neb. 677.

Receiver may be appointed. Cob. Ann. Stat. of Neb. 1911, sec. 1248 *et seq.*; Gen. Stat. Kan. 1909, sec. 5860 *et seq.*; Comp. Laws Okla. 1909, sec. 5772 *et seq.*

A petition which shows that a partnership is insolvent, that there is dissension between the partners, probability of waste, and necessity for an accounting and dissolution, states facts sufficient to warrant the court in taking cognizance of the case. *Veith v. Ress*, 60 Neb. 52.

The application or petition for a receiver should be verified by the

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685. ACTION BY STOCKHOLDERS PRAYING FOR THE APPOINTMENT OF A RECEIVER, ALLEGING INSOLVENCY.

Petitioner states that the defendant, the W. B. Co., is a corporation, etc., doing business at and having its chief office in the city of; that the plaintiff is a stockholder in said corporation, owning shares in said corporation of the shares therein; that said corporation is insolvent, and unable to pay its debts; that numerous small creditors of said corporation are threatening, and are about, to sue; that the assets of said corporation consist partly of beer on hand, and materials for making the same, and that said beer is at present unsalable; that the debts due said corporation can not be readily collected at present, to apply on the debts of the corporation; and that the assets of said corporation are liable to be wasted and frittered away to the great injury and detriment of the stockholders and creditors. Wherefore petitioner prays the court to appoint a receiver for said corporation, to take charge of the assets of said corporation.

686. ACTION AT INSTANCE OF ATTORNEY GENERAL FOR THE APPOINTMENT OF A RECEIVER FOR A STATE BANK.

The plaintiff complains of the defendants (set out names), and for cause of action alleges:

1. That heretofore, to-wit, on or about the day of applicant. But verification is not essential to jurisdiction, and the verification may be waived. *Farmers & Merchants Bank v. German Nat. Bank*, 59 Neb. 229.

The appointment of a receiver in an equitable action is ordinarily an ancillary remedy, provisional in character, and incidental to the main object or purpose of the suit. *Vila v. Grand I. E. L., I. & C. S. Co.*, 68 Neb. 222, 233.

A receiver cannot be appointed at the instance of a mere mortgagee for property not covered by the mortgage. *Vila v. Grand I. E. L., I. & C. S. Co.*, 68 Neb. 222.

Attorney representing parties interested in the property not a proper person to be appointed receiver. *Veith v. Ress*, 60 Neb. 52.

An allegation in an answer, that the defendant is a receiver duly appointed by another court, raises no question as to the jurisdiction of the court in which the answer is filed. *St. Joseph & Denver City R. R. Co. v. Smith*, 19 Kan. 225.

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....., 19.., the F. B. of C. county was duly organized under and by virtue of the laws of the State of Nebraska, as a banking corporation, for the purpose of doing business in the State of Nebraska as a state bank with a capital stock of \$. divided into shares of the par value of \$. each and thereupon entered into the business of banking in the city of B. B. and in the county of C. and State of Nebraska and continued in such business up to and about the day of, 19...

2. That on or about the day of, 19...., F. N. P., the attorney general for the State of Nebraska, acting for and on behalf of the State of Nebraska, filed in the district court of C. county, a petition alleging that the said F. B. of C. county was insolvent and asking that a receiver be appointed to take charge of all the assets of the said bank of every kind and description; that upon a hearing by the said district court it was found that the allegations stated in said petition were true and that it was for the best interests of the creditors of the said bank to appoint a receiver to take charge of the assets of said bank, together with all of its books and records and assets of every kind and description, and to collect all debts, dues and claims owing and belonging to said bank and to do any and all other things necessary in closing up the affairs thereunto belonging, and this plaintiff was upon the day of, 19.., duly appointed receiver of the said bank and immediately gave the bond required by the said order and entered upon his duties as such receiver.

3. This plaintiff further alleges that immediately after assuming charge of the affairs of said bank that he gave due and legal notice to the creditors of the said bank by publication to appear and file satisfactory proof of their claims against the said bank within six days from the date of the said notice and that thereupon and thereafter the creditors of the said bank filed with this plaintiff good and sufficient proofs of their claims existing against the said bank and that there was filed and allowed as legitimate claims against the said bank the total sum of \$., all of which amounts were

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duly allowed and approved as being valid and existing claims against the said F. B. of C. county, and of this amount the sum of \$. has been canceled and settled by payment, offset or other means and there still remains of the said claims so filed and allowed the sum of \$., which is a valid and adjudicated debt existing against the said bank.

4. This plaintiff further alleges that the above and foregoing debts and claims existing against the said bank were all contracted and became a debt during the time the defendants hereinbefore named were stockholders and owners of the said F. B. of C. county.

5. This plaintiff further alleges that all the assets of every description belonging to the said F. B. of C. county have been converted into money and the same has been applied to the payment of the claims and debts existing against the said bank and in making the payments and dividends hereinbefore referred to, and this receiver now has no funds in his hands sufficient to pay the duly allowed and approved debts still existing against the said bank.

6. This plaintiff further alleges that he has no other assets belonging to the said bank and no moneys to pay the claims now due as aforesaid; that upon filing a report by this receiver showing the conditions of the affairs of said bank, which said report was duly allowed and approved by the Hon. H. M. G., judge presiding on or about the day of, 19.., and that upon the allowing and approval of the said report the said judge then and there ordered and directed that this plaintiff proceed to collect from the stockholders of the said bank the full statutory liability from each and every stockholder of the said bank and that thereupon this plaintiff by a written demand duly made and sent through the U. S. mails, notified each and every stockholder, demanding of him the amount of his statutory liability and demanding of him the payment of the amount for which he was liable as such stockholder as provided by the laws of the State of Nebraska, and said defendants and each of them have failed, refused and neglected to pay the said liability or any part of

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the same and there is now due to this plaintiff as such receiver the full sum of the statutory liability of each and all of the said defendants.

7. This plaintiff further alleges that the above named defendants and each of them were stockholders of the said bank and owned stock therein as follows: (set out names and amount of stock).

And that under and by virtue of the stock so owned by the said defendants the said defendants and each of them are liable in the several sums equal to the amount of stock so owned by them in the said F. B. of C. county, and that the said defendant J. A. H. is justly liable for and there is due from him to this plaintiff as receiver as aforesaid the sum of \$. (set out amounts due from each one).

No part of the said amounts have been paid and the full liability of each and every stockholder as above set forth is due and unpaid.

Wherefore, plaintiff prays judgment against the said defendants and each of them for the said sums as above set forth for which each of them are liable as shown by the stock owned by them as herein set forth.²

687. APPLICATION FOR A RECEIVER IN SUIT INSTITUTED FOR PURPOSE OF FORECLOSING A MORTGAGE ON REAL ESTATE.

Comes now the defendant S. T. C. and shows to the court that he is one of the defendants in the above entitled cause, and that in his answer hereinbefore filed, defendant admitted that he was liable for the payment of one-half of the amount due upon the plaintiff's mortgage as in said petition set forth and in said answer, this defendant alleged the various transfers and conveyances of said property from this defendant to the several defendants in said answer named.

2. This defendant further alleges that one C. W. R., to whom said premises were conveyed as in the answer of this defendant alleged, executed and delivered a second mortgage upon said premises for the sum of \$. to the M. T. I. and

² From form in record in *Holcomb v. Tierney*, 79 Neb. 660.

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T. Co. and that the said T. Co., by its answer and cross petition in this case filed, is seeking to have the same foreclosed as more fully appears from said answer and cross petition filed herein, 19...

3. This defendant further alleges that the said C. W. R. has sold and delivered the said real estate to one J. C. R., defendant herein, and that each of said R.'s and each and every of these defendants, grantees, are non-residents of the State of Nebraska, and service cannot be had upon them and that no deficiency judgment can be had against them, although said defendants and each and every of them as in the answer of this defendant alleged, have assumed and agreed to pay the indebtedness due to the plaintiff.

4. Defendant further says that the said defendants, R., have not paid the taxes upon said property, but that there is now due against said property as taxes the sum of \$., which are now due and delinquent and liable to be sold and said taxes are drawing large interest, and that they have not kept the property and premises in repair; that the same are in need of great and extensive repairs to preserve the same from falling into decay and becoming unsuitable for tenants.

That the said defendants R. are collecting the rents and income from said property, and are applying the same or a portion thereof to the payment of the said second mortgage above referred to, and are neglecting, and have refused and failed to pay the taxes and make the repairs as above stated. That by reason thereof the said premises are liable to become injured and wasted and insufficient for the payment of the plaintiff's debt and that this defendant will become liable to a deficiency judgment herein unless the said premises are preserved and the rents and profits thereof used for the payment of the first and prior lien upon said premises, and that a receiver should be appointed to collect the rents of said property and apply the same to the payment of such claims against the said property. That by reason of the aforesaid premises, the rents and profits of the said property are now being diverted to pay a second and inferior lien and that the first and prior encumbrances upon the said premises are being

wholly neglected and unpaid by the said defendants R. and that interest upon the same is accumulating and said taxes increasing, and that there is great danger as aforesaid that unless the relief herein prayed for be granted, said premises will become insufficient to pay the indebtedness and the encumbrances against the same, but that if the said property be preserved and the rents and profits thereof used for the payment of taxes and repairs, the said premises will be amply sufficient to pay all the liens and charges against the same, including said second mortgage.

5. Defendant further says that he is informed and believes a stay or order of sale herein will be taken by the said T. Co., and the said defendants R. and R. and that during the pendency of such stay, the premises herein in controversy and the rents and profits thereof will be used for the payment of the said second mortgage, and the payment of the said taxes against the said premises will be neglected unless the relief herein asked for be given by the court, and that during the pendency of such stay, the interest upon said first mortgage and upon the said taxes will be increasing unless the rents and profits of the said premises be applied in the reduction of the same.

6. Defendant further says that all those defendants against whom this defendant is entitled to have a deficiency judgment, are non-residents of the State of Nebraska, and as this defendant is informed and believes are insolvent, and that if this defendant should be subjected or required to pay a deficiency judgment, he would be wholly without relief or remedy, and that unless a receiver is appointed in the premises, this defendant and the other parties to this action would be greatly injured and damaged and this defendant would be wholly and utterly without remedy or relief in the premises. That the said premises are in danger of being materially injured, and that the services of a receiver to prevent injury and to preserve the premises herein in controversy during the pendency of this litigation and of the stay of proceedings herein should be granted.

Defendant suggests the name of M. W. as receiver for the

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said premises and M. A. W. and S. H. B. as sureties for said applicant and as sureties for the said receiver.

Wherefore this defendant prays that the said court may examine into the matters and facts herein in controversy; that upon consideration thereof an order may be made by the court appointing a receiver for the premises herein in controversy and directing him, the receiver, to collect and receive the rents and profits of the said premises and apply the same upon the payment of the first and prior claims against said premises, as provided by law and under the authority of this court, and for such other and further relief as justice and equity may require.³

688. ACTION BY ONE MEMBER OF A PARTNERSHIP ASKING FOR APPOINTMENT OF A RECEIVER.

Comes now the plaintiff and complaining of the above named defendant, says: That on or about the day of, 19.., this plaintiff sold to the defendant a half interest in the grocery, tea, coffee, spice and cigar business, then being carried on by this plaintiff in the city of L., L. county, Nebraska.

Plaintiff further says that in pursuance of the terms of the said sale and purchase, a co-partnership relation was then formed between this plaintiff and this defendant under the firm name and style of V. & R., and that each was to have a half interest in the profits of the said business; that defendant entered into the possession of his half interest and ever since the business has been conducted under the said firm name V. & R. Said co-partnership agreement was verbal, but by its terms each partner was to have an equal voice in the conduct and management of the said business and in the disposition of its assets, but that notwithstanding that fact, the said defendant threatened and contemplates turning over the assets of the co-partnership to the payment of a few of the creditors thereof, and plaintiff is unwilling that it should go to those creditors, but prefers to turn it over to others, and

³ From form in record in Philadelphia Mortgage & Trust Co. v. Oyler, 61 Neb. 702.

that the assets of the co-partnership are insufficient to pay all of the partnership creditors in full if the same are forced upon the market at this time and obliged to be sold for what they would bring. That plaintiff and defendant are unable to agree among themselves as to the disposition of the partnership property and are unable to agree among themselves as to the conduct of the business, and that the defendant is about to and threatens to force a sale of the assets of the co-partnership for whatever they will bring, and against the consent of this plaintiff, thereby causing a great sacrifice of the partnership property, and leaving a large amount of partnership debts unpaid. That in the conduct of said business, the partnership has incurred a large amount of indebtedness to divers persons and corporations, and divers sums and amounts in the aggregate, as plaintiff is informed and believes, of dollars and upwards. That said indebtedness is largely in excess of the assets and resources of said co-partnership and of its ability to pay the same in case the threats of this defendant are carried out and the assets of the co-partnership are forced to be sold for what they will bring, and he further says that a large amount of the indebtedness above mentioned is past due and the creditors of the co-partnership are threatening and about to commence actions seeking to seize the partnership or a part thereof; that said actions, if allowed to go to judgment, would cause a great and irreparable loss of the partnership assets, would destroy the good will of the business, which plaintiff avers is a considerable portion of its assets, and will result in great and irreparable damage and loss to other creditors of said co-partnership whose claims are not yet due.

Plaintiff further says that the nature of the said business is such as to require large and extensive store rooms, and the employment of a large number of clerks, bookkeepers, and other employees, at large salaries and expense to said co-partnership, all of which expenses in the aggregate exceed the profits realized by the said co-partnership, so that the continued attempt to carry and transact the said business as a co-partnership is, owing to the matters and facts hereinbefore set forth, a constant increased loss to said co-partnership and

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its creditors, and if the attempt to conduct the said business is longer persisted in by the parties hereto, and a portion of the creditors carry out their above mentioned threats the entire assets and resources of said co-partnership are liable to be, and will be dissipated and lost and the co-partnership creditors deprived of the means of satisfying their several claims.

Plaintiff further says that the assets of said co-partnership consists of the stock of tea, coffee, spices, cigars, tobacco, flour, sugar, apples, dried fruits, canned goods, potatoes, and other articles, including office furniture and fixtures, delivery wagons and horses, and book accounts, and is of the value not to exceed, as plaintiff is informed and believes, the sum of dollars.

Further plaintiff avers that owing to the matters and facts as hereinbefore set forth, it is impossible for the partnership business to be continued or to adjust the conflicting demands arising from the claim of the creditors of the co-partnership, and the conflicting demands between the partners themselves, or to obtain a fair and adequate price of the partnership assets, including the good will of the business without the appointment of a receiver.

Wherefore plaintiff prays that an accounting may be had of the rights and interest of the various parties hereto in and to the partnership property; that the receiver may be appointed with power and authority to take possession of the said property, estate effects and assets of said co-partnership, to collect, receive and receipt for all the sums and amounts owing to said co-partnership, and to convert said estate, effects and property into money; to ascertain the several sums owing to the said several creditors of the said co-partnership, and to distribute the said proceeds among the said creditors in proportion to the amount of their respective claims; and undertake and perform such other acts and duties as are usually required of receivers in similar cases; that a dissolution of the co-partnership may be decreed; the rights of the several partners be fixed and determined by this court, and that the court may at this time and from time to time make such other, further

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order, judgment or decree as equity and good conscience may require.

Plaintiff nominates as such receiver H. S. and proposes as sureties for the said receiver P. W., C. W., R. B., and plaintiff proposes as sureties for himself P. W., C. W. and R. B.⁴

689. ACTION BY STOCKHOLDERS FOR THE APPOINTMENT OF A RECEIVER FOR A DEFUNCT CORPORATION FOR THE PURPOSE OF COLLECTING UNPAID SUBSCRIPTIONS FROM SHAREHOLDERS, ALLEGING INSOLVENCY OF THE CORPORATION.

Plaintiff states that the Co. is a corporation organized and existing under and by virtue of the laws of the State of; that the capital stock of said corporation is dollars, divided into shares of the par value of dollars each. That said corporation has become defunct and that at the time said corporation became defunct was president and were directors of said corporation and by virtue of the statute governing the dissolution of corporations said officers have become statutory trustees of said corporation, and as such trustees are made defendants herein.

That at the time of the organization of said corporation all of the capital stock was subscribed for by parties in the State of and elsewhere, and per cent. of the capital stock of said corporation was paid into the treasury of said corporation by the stockholders, and that no other sum of money has ever been paid into the treasury by any stockholder thereof.

That S. M. F., one of the plaintiffs herein, subscribed for and is the owner of shares of the capital stock of said corporation, and that D. S. O., the other plaintiff herein, subscribed for and is the owner of shares of the capital stock of said corporation.

That there are about stockholders in said corporation holding from shares to shares each, and that some of the stockholders in said corporation are non-

⁴ From form in record in Veith v. Ress, 60 Neb. 52.

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residents of the State of, and that quite a number of the stockholders of said corporation are insolvent.

That the money heretobefore mentioned and paid into the treasury by the stockholders has been expended, and other debts and liabilities contracted by said corporation amounting to about the sum of dollars, which has been unpaid by said corporation; that said corporation has no property or assets, and is wholly insolvent; that V. B. recovered a judgment which is of record in the court of J. county, for the sum of dollars, and costs; that K. & W. recovered a judgment against said corporation for the sum of dollars, which is of record in said court; that after the obtaining of said judgment the said judgment creditors in said respective judgments again filed a motion under the statute asking judgment against plaintiff, D. S. O. and judgment in said two actions was rendered against plaintiff D. S. O., for said amounts above stated, which judgment so rendered was by D. S. O. paid.

That C. S. C., in the said court of J. county, ..., recovered a judgment against said corporation, which, together with costs, amounted to the sum of dollars; that after the obtaining of the said judgment said judgment creditor filed a motion in said action under the statute asking judgment against plaintiff, S. M. F., upon his unpaid stock, and a judgment upon said motion was rendered against plaintiff, S. M. F. for the said sum of dollars. Plaintiffs further represent and show that there are other judgments and claims remaining unpaid that have been rendered against and owing by said corporation.

That they, by reason of said judgments so rendered against them, and such other stockholders as may be compelled to pay said other judgments and outstanding claims, are entitled to contribution from the remaining stockholders of said corporation that are solvent; that no stockholder has paid into the treasury or expended any money for said corporation other than the per cent. paid in as heretofore stated, and that all of the stockholders of said

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corporation are liable to plaintiffs for their proper and proportionate share towards paying said judgments.

That said corporation was organized in, 19.., since which time and for the last months there has been no meeting of the board of directors and officers of said corporation, and that said officers and directors have failed to call in any proportion of the unpaid installments due from the stockholders upon the capital stock due by the stockholders to the corporation, and have failed and neglected to make any provision for the payment of the judgments rendered against said corporation and the debts owing by said corporation.

That a number of the stockholders of said corporation are non-residents of this state, a number are insolvent, and the only way in which a fair and equitable settlement of the debts of said corporation can be made by the solvent stockholders thereof is by the appointment of a receiver, with the power to collect from such solvent stockholders their proper and proportionate share necessary to pay the debts of said corporation and the proper costs of these proceedings.

Wherefore plaintiff prays that said corporation may be wound up and dissolved, and to that end that a receiver may be appointed herein with full power and authority to take possession of the books, papers and property of said corporation, and that such receiver, under the order of this court, be given authority to collect the unpaid installments of the stockholders sufficient in amount to properly reimburse your orators and pay such other and remaining judgments and debts as are owing by said corporation, together with the costs of these proceedings.

690. NOTICE OF APPLICATION FOR A RECEIVER.

To W. A. De B. and D. L. J., Attorneys for Defendants:

You are hereby notified that on the day of, 19.., at o'clock in the forenoon, or as soon thereafter as I can be heard, I will apply to G. R. C. R., judge of the district court for county, for the appointment of a receiver of all the property and assets of the F. M. F. Ins.

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Co., on the ground that said defendant company is wholly insolvent and that the property and assets of said company are in danger of being wasted and destroyed, and upon the further ground that the directors of said company have abandoned their duties as directors of said company and are making no effort to collect from the members of said company sufficient money to pay the claims of the creditors of the company. Such application is based upon the petition of the plaintiff. I propose the name of E. R. L., or H. B. N., as receiver, with I. B. N. and C. B. N. as his sureties. I also offer I. B. N. and C. B. N. as sureties for myself.

E. A.

By A. L. S., His Attorney.

Receipt of above notice is hereby acknowledged. Time of service waived.

P. F.⁵

⁵ Form in *Murphy v. Fidelity Mutual Fire Ins. Co.*, 69 Neb. 489.

Notice should be given before a receiver is appointed to wind up the affairs of an insolvent bank corporation. *Holcomb v. Tierney*, 79 Neb. 660.

An order appointing a receiver in a case brought for the foreclosure of a mortgage without notice served on the defendant, or his solicitor, as required by section 267 of the Code of Civil Procedure of Neb. is void. *Johnson v. Powers*, 21 Neb. 292.

Notice of an application for the appointment of a receiver as required by the statute may be waived by the parties entitled to notice. *Murphy v. Fidelity Mut. Fire Ins. Co.*, 69 Neb. 489; *Farmers & Merchants Bank v. German Nat. Bank*, 59 Neb. 229; *Veith v. Ress*, 60 Neb. 52.

CHAPTER LVI.

REFORMATION AND CANCELLATION OF INSTRUMENTS.

- 691. Action to cancel a note and mortgage.
- 692. Action to cancel a deed and contract alleged to have been made by plaintiff by reason of undue influence.
- 693. Action to cancel a deed alleged to be a forgery.
- 694. Action to cancel and set aside deed alleged to have been obtained through undue influence exercised over the grantor, and praying order restraining sale, etc.
- 695. Action to cancel and set aside a deed made by the grantor but never delivered to the grantee.
- 696. Action to reform a deed by including in the conveyance additional land omitted by mistake.
- 697. Action to reform a deed where the mistake was alleged to have been made by one party induced by the fraud of another.
- 698. Action to reform a deed so as to reserve to the grantor the crops growing upon the land.

691. ACTION TO CANCEL A NOTE AND MORTGAGE.

Plaintiffs, W. D. W. and L. F. W., state that they are the owners in fee simple and in the actual peaceable possession of the following described land situated in this county and state, to-wit: (describe land).

Plaintiffs for their cause of action show to the court that on or about the day of, 19..., being possessed of said land, and wishing to borrow the sum of \$....., they executed in good faith one promissory coupon note for the sum of \$..... payable to said defendant, G., or order years from the day of, 19..., with interest thereon at per cent. per annum, the same being secured by mortgage deed executed by both these plaintiffs upon said real estate. A copy of which is hereto attached marked "exhibit A," and mailed said note and mortgage deed to said defendant with the understanding and the instructions from the recognized agents of said defendant,

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that on receipt of said note and mortgage deed by said defendant he would immediately pay by bank draft or other order for money the sum of \$. to the said plaintiffs and payable to the said plaintiffs.

That said defendant received said note on or about the day of, 19.., and said mortgage deed on or about the day of, 19.., and acknowledged receipt of same. Yet notwithstanding the premises and agreements, and contrary to equity and good conscience, said defendant, G., has wholly failed to pay to said plaintiffs or caused to be paid to said plaintiffs said \$. or any part thereof. That said defendant also absolutely refuses to return the said note and mortgage deed for said land, although the said plaintiffs have made insistent demand for said notes and mortgage deed.

Plaintiffs aver that defendant N. P. G. obtained possession of said notes and mortgage deed for the said land to cheat, wrong and defraud plaintiffs.

That said defendant has obtained possession of said notes and mortgage deed without giving any consideration, therefore, and that defendant's agreement to pay the money on receipt of said notes and mortgage deed was not made or given in good faith, and no part of said money has ever been paid or notes or mortgage deed returned and that plaintiffs by reason of defendant's fraud have been cheated, wronged and defrauded. That the said notes and mortgage deed have not been assigned or transferred by the said defendant, but are yet his property as shown by the certificate of the register of deeds for the county aforesaid hereto attached and marked "exhibit B." But that these plaintiffs have reason to fear and do fear that the said defendant will transfer or assign said note and mortgage deed before the maturity thereof. That the said mortgage can not be legally transferred without the transfer being recorded by the register of deeds of said county. These plaintiffs therefore pray that said defendant, G., be temporarily enjoined from selling, transferring or surrendering the possession of said note and mortgage deed to any person whatsoever or from parting

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with the possession thereof in any way until the final determination of this action. Also that the register of deeds of said county be temporarily enjoined from entering of record or recording any instrument purporting to be a transfer of the title and possession of said mortgage deed; that upon the final hearing of this action the said defendant be ordered and decreed to deliver up the said note for cancellation and destruction, and these plaintiffs, said mortgage deed, given on said land to secure said note, may be ordered canceled and released of record; and that it may be decreed that these plaintiffs owe nothing to said defendant N. P. G., on said notes to any one holding under him subsequent to the bringing of this action and for their costs and such other and further relief as to the court may seem just and proper.¹

692. ACTION TO CANCEL A DEED AND CONTRACT ALLEGED TO HAVE BEEN MADE BY PLAINTIFF BY REASON OF UNDUE INFLUENCE.

Comes now the plaintiff, W. H. Y., and for cause of action against the defendants alleges and states:

1. That he is aged and infirm, and that on or about the times hereinafter mentioned his health was so poor and he was in such a physical condition as to impair his mind, that the said defendants and each of them were aware of his physical and mental condition at said time and took advantage of same to defraud the said plaintiff out of his homestead which is described as follows, to-wit: (here describe property).

2. That by means of false statements, made by said defendants to this plaintiff, which he relied on and believed to be true but which said defendants well knew to be false and fraudulent at the time of making same, plaintiff was induced by the said defendants, owing to his feeble condition physically and mentally and by reason of said false statements, to make and enter into a contract in writing, on the day of, 19.., by which he was to convey and subsequently did convey to one of the defendants, to-wit, M. M. S., the above described tract of land, a copy of said contract is filed herewith as part hereof and marked "exhibit A."

¹ From form in *Garretson v. Witherspoon*, 15 Okla. 473.

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3. That said defendants and each of them are related to this plaintiff as follows, L. B. S. being a sister of said plaintiff, and W. W. and A. C. S. being nephews of plaintiff and defendant M. M. S. being a niece of plaintiff; that said relationship gave defendants an advantage over plaintiff, knowing that he would rely upon their attestation of affection and interest to a much greater extent than if they had been strangers and not related as above stated, and plaintiff did rely upon said defendants' statements by reason of said relationship, and said contract was obtained and said deed executed by reason of said relationship and said false and overreaching statements, and undue influence exerted upon plaintiff in his enfeebled and weakened condition.

That said false and fraudulent statements were made by the said M. M. S., and the other defendants in her behalf and by her procurement.

4. That said defendants and each of them and M. M. S. by and through the other defendants for her and in her behalf, assured plaintiff that if he would sign the said contract and execute the deed to said land and deliver same to said defendant M. M. S. that he would be tenderly cared for and should never want for anything in the way of care and attention; that they would anticipate his every want and relieve plaintiff from every care and anxiety, and bestow upon him every attention that love and affection could dictate; that plaintiff relied upon said statements so made as aforesaid, and executed said deed and delivered same to defendant M. M. S., by reason of said representations and relationship as aforesaid; that defendants constantly besieged plaintiff, and being so many in number, and stronger than plaintiff, overreached plaintiff. That a copy of said deed is filed herewith as part hereof marked "exhibit B."

5. That there was no other consideration for the transfer of said land to the said M. M. S. except as set out in the contract filed herewith.

6. That as soon as plaintiff executed and delivered said deed to defendant M. M. S., said defendant and each of them assumed an entirely different attitude toward plaintiff and

have failed to comply with the terms and conditions of said contract in that they have not furnished plaintiff with needful clothing and sustenance and medicine, and plaintiff has not been furnished with a horse and buggy as provided for in said contract, plaintiff having to walk wherever he goes, and work to provide for himself the simplest comforts and necessities of life.

7. That said defendants are unkind and cross with plaintiff, and make his life almost unbearable by their unkindness and inattentions to and toward said plaintiff.

8. Plaintiff further alleges that defendant M. M. S. and each of the other defendants are endeavoring to sell and dispose of the tract of land, conveyed by this plaintiff to the said M. M. S., with a view of leaving this country for parts unknown to this plaintiff, and if said defendant is allowed to dispose of said tract of land plaintiff will be on the mercies of the world and without any recourse whatever.

9. Plaintiff further alleges that he has no adequate remedy at law, that unless the court intervenes and cancels the said deed so obtained from this plaintiff by the fraud and collusion of the said defendants, plaintiff will be deprived of his only visible means of support and without recourse against the said M. M. S. or either of said defendants.

Wherefore plaintiff prays that said contract be declared void and said deed so obtained from the plaintiff by the said M. M. S. be canceled and declared null and void, and said land be restored to the plaintiff herein.²

693. ACTION TO CANCEL A DEED ALLEGED TO BE A FORGERY.

Plaintiff for cause of action states:

1. That on the day of, 19.., and immediately prior thereto, L. M. S., niece and heir of the late J. W., was the owner in fee of the following described premises, viz.: (here describe).

2. Plaintiff further complaining avers that on the day of, 19.., the said L. M. S., and her husband, H. S. S., by good and sufficient deed and for a valuable con-

² From form in record in Spangler v. Yarborough, 23 Okla. 806.

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sideration, conveyed to her the title in fee to said above described land, and that she is now the complete and sole owner of the title to said land, and all the interest of L. M. S. therein; a copy of said deed is hereto attached, marked "exhibit A" and made a part of this petition.

3. And plaintiff further avers and complains that on , 19.., at A. M., the said G. R. C. filed in the office of the county clerk of C. county, Nebraska, for record, a pretended deed to the land herein described, purporting to run from E. S., an unmarried woman, and a resident of G., Texas; said deed purports to have been made in G., in the county of G., Texas, on the day of , 19.., and to be acknowledged before one G. W. B., notary public of said county, and to be witnessed by one J. R. and one J. P. C. Now plaintiff alleges that said pretended deed is a fraudulent conveyance; that there is no such person as E. S., who has now or ever has had an interest in said described land; that there is no such notary as G. W. B., or witnesses J. R. and J. P. C., in G., Texas, now, or at the time of the execution of said deed as therein indicated; wherefore plaintiff alleges that said deed is a fraud, and that the record of the same makes an illegal and fraudulent incumbrance upon plaintiff's title to said property, the name of E. S., appearing to said deed as grantor, being a forgery.

4. Now, plaintiff further avers that L. M. S., the heir of J. W., deceased, and a married woman, was, at the time of J. W.'s death and at the date of the fraudulent conveyance herein described, a married woman; her home being in O., A. county, C.; that she did not sign the pretended deed to G. R. C., defendant; that she had no knowledge of its existence for a long time after its record in C. county.

Wherefore, etc.³

* **Form** in *Delorac v. Conna*, 29 Neb. 791.

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694. ACTION TO CANCEL AND SET ASIDE DEED ALLEGED TO HAVE BEEN OBTAINED THROUGH UNDUE INFLUENCE EXERCISED OVER THE GRANTOR, AND PRAYING ORDER RESTRAINING SALE, ETC.

Plaintiffs state that they are the only surviving children and heirs at law of T. R. That said T. R., on or about the day of, 19.., departed this life, leaving as his sole heirs at law the above named plaintiffs. That on the day of, 19.., and long prior thereto, the defendant was so habitually addicted to the use of intoxicating liquors as to affect his judgment, and render him easily influenced and of unsound mind. That on the said day of, 19.., while said T. R. was in a weak and sickly condition, being then of unsound mind, and while residing with and being under the influence of the defendant, did make, execute and deliver, for and in consideration of the sum of dollars in hand paid to said T. R. by said defendant, a deed conveying to defendant the following described real estate situate in the city of, State of, to-wit: (describe).

That said consideration was totally inadequate, if in fact paid, and said deed was obtained by and through the undue influence exercised over said T. R. by said defendant, with the view to deprive the plaintiffs herein of their rights in said land.

Wherefore plaintiffs pray the court for a decree setting aside, annulling and canceling said deed as aforesaid, divesting the title out of said defendant, and vesting the same in the plaintiffs herein; and plaintiffs pray that the defendant, her agents and employees, be enjoined and restrained from selling said property as aforesaid, and that they recover of the defendant their costs and charges herein expended and have execution issue therefor.

695. ACTION TO CANCEL AND SET ASIDE A DEED MADE BY THE GRANTOR BUT NEVER DELIVERED TO THE GRANTEE.

Plaintiffs state that W. P. died intestate on the day of, 19..; that prior to his death, to-wit, on the

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..... day of, 19.., his wife, C. P., died; that the plaintiffs H. P. and E. P. are children of the said W. P.; that the defendant B. B. is the husband of M. B., the daughter of W. P.; that said H. P., E. P. and M. B. are all of the children and heirs of said W. P. and as such are owners as tenants in common of the land owned by the said W. P. at his death.

Plaintiffs further state that during his life the said W. P. was the owner and in possession at the time of his death of the following described real estate (describe).

Plaintiffs further state that during their father's lifetime, to-wit, on, 19.., he and their mother caused to be prepared a warranty deed for said land to the defendant, B. B., their son-in-law; that they executed and acknowledged it, and left it in the hands of the scrivener, without any directions concerning its disposition; that they never delivered the deed to said B. B., nor to any one for him; that shortly after making the deed their father died; that the deed never was delivered to B. or to any one for him during their father's life; that after their father's death, said B. B. wrongfully and unlawfully obtained possession of said deed and caused it to be placed upon record, and now asserts title to the land.

Wherefore plaintiffs pray that said deed be ordered to be delivered up and canceled and for all proper relief.

696. ACTION TO REFORM A DEED BY INCLUDING IN THE CONVEYANCE ADDITIONAL LAND OMITTED BY MISTAKE.

And now comes the above named plaintiff R. M., by A. W. C., his attorney, and complaining of the above named defendants, avers and respectfully shows to the court that on or about the day of, 19.., the above named defendant I. G. G. was the owner of nine quarter sections of land in said county, among them, the following described land, to-wit: (describe land); that the said defendant R. S. G. was, and still is the wife of the defendant I. G. G.; that on or about said day the said defendants entered into an oral contract with this plaintiff wherein and whereby

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they sold, and agreed to convey by a good and sufficient warranty deed, all of said land, including the land above described, to this plaintiff, in consideration whereof, this plaintiff agreed to pay them for such conveyance, the sum of \$. upon delivery of said deed; that thereupon, on said day, all of the parties to this suit repaired to the office of R. & S., notaries public, in the city of C. in said county, to have said deed prepared for execution by said defendants, and the said R. prepared said deed, as all of the parties supposed, to convey all of said land, including that specifically above described, but by mutual mistake of the parties and of said scrivener, the parcel of land above described was inadvertently omitted from said deed, and was not described therein; that the said defendants on said day, executed said deed so prepared by said scrivener and delivered the same to this plaintiff, who, supposing and believing, as did said defendants, that it described and conveyed said land above described, paid said consideration money amounting to \$., received and accepted said deed and on the day of, 19.., had the same duly indexed and recorded in the office of the county clerk of said county, in book of deeds, at page thereof, where it still remains of record in said office, and this plaintiff immediately upon the execution and delivery of said deed, took possession of all of the land therein described and also took possession of the land above described, and has ever since had, kept and retained the use, possession and enjoyment thereof, and still owns and possesses all of said lands.

That on or about the day of, 19.., this plaintiff discovered for the first time, that the said tract of land above described, had been omitted by mistake from said deed, and he caused the said S. to request the said defendants to execute a deed thereof to this plaintiff, which the said defendants at first promised to do, but they have since failed and neglected, and now refuse to execute a deed thereof, running to this plaintiff, as in equity and good conscience they ought to do, and still fail and refuse to execute and deliver such deed.

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Wherefore this plaintiff prays that his deed, and the record thereof, in the office of said county clerk in book of deeds, at page thereof, be reformed and corrected, so as to include and describe the land above described, and when so reformed and corrected, that it be deemed in all courts and places as and for the true conveyance of said lands including the lands above described, and for such other and further and different relief in the premises as may be just and equitable.⁴

697. ACTION TO REFORM A DEED WHERE THE MISTAKE WAS ALLEGED TO HAVE BEEN MADE BY ONE PARTY INDUCED BY THE FRAUD OF ANOTHER.

Comes now the plaintiff in the above entitled action and for her cause of action against the defendants herein, E. C., states: that the defendants herein are husband and wife.

That on or about the day of, 19.., the defendants herein contracted with, agreed to and did sell and convey to this plaintiff by deed of general warranty a tract of ground in (describe property).

That the consideration therefor was dollars and was paid as follows: dollars in cash and the assumption of a mortgage on said premises of dollars.

That the plaintiff herein duly filed said deed in the office of the recorder of deeds of S. county, Kansas;

That the defendants herein personally and by and through their agent represented to this plaintiff that the said tract of land was located on W. avenue in the city of W., in S. county, Kansas, and that the tract to be conveyed was to be such land as was enclosed by fence and by cement walks and by cement coping and was lots one, two, three, four, five and six in said H.'s second subdivision to the city of W., in S. county, Kansas;

That this plaintiff, relying and depending upon the said representations of the defendants and their agent purchased the said tract of land for the said sum of dollars;

That the defendants before and at the time of said pur-

⁴ From form in record in Mitchell v. Griffith, 87 Neb. 140.

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chase knew that the said representations were false and untrue but that he withheld said facts from this plaintiff with the intention and purpose of misrepresentation and fraud as to this plaintiff;

That the said tract of land is as a matter of fact not on W. avenue in the city of W., Kansas, but about feet to the west of said avenue, that there lies between said tract of land and said avenue a strip of ground about feet wide and feet long, the same being designated as lot numbered on the recorded plat of H.'s second subdivision and the west feet of lot all in M.'s addition to the city of W., in S. county, Kansas;

That the defendants are now and ever since about the day of, 19.., have been the owners in fee simple of said lot numbered in H.'s second subdivision and the west feet of lot numbered in M.'s addition to the city of W., S. county, Kansas;

The plaintiff further states that the said tract of land deeded to this plaintiff is not such tract as was represented by the defendants herein and their agent in so much as there is to the west of said lots one, two, three, four, five and six a strip of ground about feet wide and feet long, the same being designated as lot numbered on the record on the recorded plat of said H.'s second subdivision to the city of W., Kansas;

That the defendants are now and ever since about the day of, 19.., have been the owners in fee simple of said lot and that the said lot numbered is enclosed with said lots one, two, three, four, five and six by fence;

That this plaintiff has demanded of the defendants to reform said deed so as to embrace all such land as was represented to be conveyed by the defendants to this plaintiff but that the defendants refused and still continue to refuse so to do;

Wherefore, this plaintiff prays the court that the said deed be reformed to read so as to convey all of said above described land (here describe lots) for the costs of this action

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and for such other and further relief as the court may deem just and equitable.⁵

696. ACTION TO REFORM A DEED SO AS TO RESERVE TO THE GRANTOR THE CROPS GROWING UPON THE LAND.

Plaintiff for a cause of action states, that on the day of, 19.., the said plaintiffs were the owners in fee simple of, and in possession of, and entitled to the possession of, the following described real estate, situated in the county of K., and State of O., to-wit: (here describe), together with all the crops standing, being and growing thereon, and the tenements, hereditaments and appurtenances thereunto appertaining, and that on said day of, 19.., the said M. E. M. and R. M., husband and wife, conveyed by warranty deed to said defendant M. H., the said premises, save and except all the wheat crop, potato crop and fruit crop then being and growing on said premises; that said M. H. and H. H. are husband and wife, and it was agreed between the said plaintiffs and the said defendants, on said day of, 19.., in consideration of the sale of said premises by said plaintiffs to said defendant, M. H., that said plaintiffs would reserve the said crops above mentioned, and through misunderstanding and by mistake the reservation to said plaintiffs of said crops was left out of said deed. The said plaintiffs, believing that said reservation of said crops to said plaintiffs was in said deed at the time of the execution thereof, signed the same, and said deed ought to be reformed so as to reserve said crops to said plaintiffs.

That at the time of the execution of said deed one W. A., a tenant of said plaintiffs, had and now has about acres of wheat standing and growing on said premises, of which wheat said A. was to receive and said plaintiffs were to receive, measured in the half bushel at the time of the threshing thereof, and said plaintiffs were to pay said A. cents a bushel for threshing their of said wheat crop.

⁵ From form in record in Cox v. Beard, 75 Kan. 389.

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That said plaintiffs have and own on said premises, now standing, being and growing, about acres of wheat; that all of said wheat is about ripe and ready to harvest.

That said plaintiffs have also on said premises, now standing, being and growing, a fruit crop and a potato crop, being of the value of about dollars; that the value of plaintiffs' interest in said wheat crop is about dollars; that the aggregate value of plaintiffs' interest in and to said crop is dollars.

That the said defendants now claim all of said grain, fruit and potatoes and threaten to take the same and convert the same to their own use, and that said defendants are wholly insolvent and irresponsible and will, unless enjoined and restrained by this court, take and convert said property to their own use, and said plaintiffs will suffer irreparable injury thereby and have no adequate remedy at law. And the plaintiffs' injuries are not susceptible of adequate compensation in damages, and said defendants and each of them are now threatening to and will, unless enjoined by the order of this court, convert said property, the crops mentioned, to their own use.

Wherefore, the plaintiffs pray that the said defendants and each of them be enjoined and restrained from in any manner interfering with the said plaintiff's right to and possession of said crops hereinbefore mentioned, and that on the final hearing of this cause said injunction be made perpetual, and that said plaintiffs be adjudged the owners of and entitled to the possession of said crops, and that said deed be corrected and reformed so as to reserve said crops as hereinbefore stated, to plaintiffs, and for such other and further relief as to the court may seem lawful and equitable, and that said defendants pay the costs of this action.⁶

⁶ Form in *Marshall v. Homier*, 13 Okla. 264.

Facts showing the lack of an adequate remedy at law should be pleaded in an action to cancel a deed. *Mosier v. Walter*, 17 Okla. 305.

Where one has a plain, complete and adequate remedy at law for a breach of warranty of a chattel, or for deceit practiced in the sale of the same, either in an action for damages or as a defense to notes given in part payment of such chattel, and there is no allegation in the

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petition that the vendor, which is the payee of the notes, is insolvent and unable to respond in damages, or that it is about to transfer the notes before maturity to an innocent purchaser, equity will not decree that the notes be surrendered and canceled, but will relegate the party to his action or defense at law, so that the issues may be tried by a jury. *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okla. 578.

In a petition to cancel a conveyance of real property alleged to have been obtained by false and fraudulent representations, an allegation that the plaintiff, in reliance upon such representations, parted with the title to the land is a sufficient plea that he was damaged by the fraud. *Rihner v. Jacobs*, 79 Neb. 742.

In a petition in equity to procure the rescission of a contract for exchange of real estate on account of false and fraudulent representations, if the petition contains the other material allegations it is sufficient to offer to return all that was received by the exchange. *Day v. Mooney*, 3 Okla. 608.

In an action for rescission and cancellation of a deed fraudulently obtained, an allegation that plaintiffs are ready and willing to execute and deliver a deed to the land traded for, to defendants, is a sufficient "offer to restore" to bring the plaintiffs within the terms of section 827, Wilson's Rev. & Ann. St. Okla. 1903. *Clark v. O'Toole*, 20 Okla. 319.

A pleading for rescission of a contract for a breach in its conditions must allege the ground upon which a right to rescind is based—an offer to rescind without unnecessary delay by a tender of the property received, with a request for a return of the consideration. The offer to return the property must be continuous, and kept good by a proper averment to that effect. *Alfree Mfg. Co. v. Grape*, 59 Neb. 777.

Facts which show that the plaintiff will suffer damages unless cancellation is made as prayed for should be alleged in an action to cancel a contract on the ground it is void. *Ringle v. Quigg*, 74 Kan. 581.

Reformation of an instrument may be made in action for specific performance. *Bacon v. Leslie*, 50 Kan. 494.

Where it is sought to cancel a contract by reason of the failure of one party to perform, it should appear that the defendant has been fairly notified and given a reasonable time to comply with the contract. *Winfield v. Winfield Water Co.*, 51 Kan. 70.

In order to reform a deed on the ground of mistake, by inserting therein a clause limiting the use of the land conveyed, it must appear that the mistake was mutual and common to both parties to the instrument, and that both had done what neither intended. *Owen v. City of Tulsa*, 27 Okla. 264.

CHAPTER LVII.

REPLEVIN.

- 699. Petition in replevin for possession of certain property alleged to have been wrongfully taken out of plaintiff's possession.
- 700. Action for the possession of personal property and damages for its detention.
- 701. Action by head of a family against the sheriff claiming the property as being exempt.
- 702. Action to recover certain personal property by virtue of a chattel mortgage.
- 703. Action for the possession of certain personal property setting up special ownership by virtue of a chattel mortgage.
- 704. Petition in action of replevin where no order of delivery is asked.
- 705. Action for goods or their value.
- 706. Action for possession of property alleging special ownership by virtue of a chattel mortgage.

699. PETITION IN REPLEVIN FOR POSSESSION OF CERTAIN PROPERTY ALLEGED TO HAVE BEEN WRONGFULLY TAKEN OUT OF PLAINTIFF'S POSSESSION.

Plaintiff avers, it is a corporation duly organized, existing and doing business at W., State of, under and by virtue of the laws of the State of

That on to-wit: the day of, 19.., F. P. and J. A. M., doing business as M. & P., executed and delivered their certain promissory note in writing for the sum of dollars payable to the order of the S.-S., L. S. C. Co., due and payable six months after date. That before the maturity of said note the said S.-S. L. S. C. Co., for a valuable consideration paid by this plaintiff to said S.-S. L. S. C. Co., endorsed said note to this plaintiff, and delivered the same to plaintiff, a copy of which note, with all endorsements is hereto attached, marked "exhibit A" and made a part hereof.

Plaintiff further states that at the time of the execution of said note and to secure the payment of same, the said

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J. A. M. and F. P., made, executed and delivered to the said S.-S. L. S. C. Co., a chattel mortgage upon head of four- and five-year-old steers, branded W. on right hip; said cattle being then located in the O. I. reservation attached to P. county, Oklahoma, for judicial purposes.

That, thereafter, and on, to-wit, the day of, 19.., the said chattel mortgage was duly filed for record in the office of the register of deeds of P. county, and also as by law provided, a certified copy of said chattel mortgage was duly filed with the register of deeds of P. county, a copy of which mortgage together with all endorsements thereon and the certificate of the register of deeds of P. county, showing the filing of the same, and that the same is now on file in the office of the register of deeds of P. county, is hereto attached, marked "exhibit B" and made a part hereof.

That the plaintiff, the S. B. of W., a corporation of W., ..., is now the holder and owner of said note marked "exhibit A"; and that the said F. P. and J. A. M. failed to pay their said note marked "exhibit A" and made a part of this petition, at the time the same was due and payable, but made default in the payment of the same; that by the terms and conditions of said chattel mortgage, marked "exhibit B," the plaintiff herein was entitled to the possession of the said head of four- and five-year-old steers, branded W. on the right hip, embraced in and covered by said chattel mortgage heretofore mentioned and marked "exhibit B," and pursuant to the said default, the said J. A. M. and F. P. delivered to this plaintiff the said head of four- and five-year-old steers, branded W. on the right hip under said mortgage, said delivery being made on the day of, 19..; that this plaintiff had the possession of all of said head of steers from the said date the day of, 19.., and held possession of said head of cattle in the O. I. reservation until during the night of, 19.., at which time the defendant wrongfully and unlawfully and without the consent of this plaintiff and without authority of law took said head of four- and five-year-old steer cattle

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branded W. on the right hip from the pasture where this plaintiff held the same and removed the same to the K. I. reservation attached to K. county, ..., for judicial purposes, where the defendants and each of them unlawfully and wrongfully withheld the possession of said cattle from this plaintiff, and held the same at said place at the commencement of this action.

That the said cattle at the time the same were taken from the possession of this plaintiff were of the actual value of dollars per head or of an aggregate value of dollars; that plaintiff demanded the return of said cattle of the defendants but that the same was refused.

That said property was not taken in execution on any order or judgment against the plaintiff for the payment of any tax fine or amercement assessed against plaintiff, or by virtue of an order of delivery issued under an order of replevin issued under the laws of the State of O. or any other mesne or final process issued against the plaintiff. The plaintiff was entitled to the immediate possession of said property.

Wherefore the premises considered, plaintiff prays judgment for a recovery of the possession of said head of four- and five-year-old steers branded W. on the right hip, and if the delivery of said property cannot be had a judgment of dollars against the said defendants and each of them for the value of said property and a further judgment for plaintiff's damages by the reason of the wrongful taking of said property, in the sum of dollars, the costs of this suit and such other relief as in law plaintiff is entitled.¹

¹ From form in *State Bank of Waterloo, Ill., v. City Nat. Bank of K. C.*, 18 Okla. 10.

Statutory provisions. Cob. Ann. Stat. Neb. 1911, sec. 1152 *et seq.*; Gen. Stat. Kan. 1909, sec. 5769 *et seq.* Comp. Laws of Okla. 1909, sec. 5687 *et seq.*

Plaintiff must allege and prove. (1) That he is the owner of, or has a special interest in the property in controversy. (2) That he is entitled to the immediate possession thereof. (3) That defendants wrongfully detain the same. *Robb v. Dobrinski*, 14 Okla. 563; *Robin-*

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700. ACTION FOR THE POSSESSION OF PERSONAL PROPERTY AND DAMAGES FOR ITS DETENTION.

The plaintiffs complain of the defendant and allege for cause of action that they are the absolute and unqualified

son & Co. v. Stiner, 26 Okla. 272; Hoisington v. Armstrong, 22 Kan. (110) 91; Haggard v. Wallen, 6 Neb. 271; Daniels v. Cole, 21 Neb. 156; Curtis & Co. v. Cutler, 7 Neb. 315; Robinson v. Peru Plow & Wheel Co., 1 Okla. 140.

One who holds the full legal title to personal property, the beneficial ownership of which he shares with another, may in his own name maintain an action to recover the possession thereof from a stranger. McDonald v. Daniels, 76 Kan. 388.

The surety on the undertaking given by the plaintiff, as such, has no legal interest in the property replevied; nor can he maintain an action of replevin against one wrongfully dispossessing such plaintiff of the property. Jimmerson v. Greene, 7 Neb. 26.

Wrongful detention of the property by the defendant is the gist of the action. Haggard v. Wallen, 6 Neb. 271; Moore v. Kepner, 7 Neb. 291.

The wrongful detention must exist at the time the suit is commenced. Redinger v. Jones, 68 Kan. 627; Wilhite v. Williams, 41 Kan. 288.

A plaintiff who claims a special ownership by virtue of a chattel mortgage must, in his petition, allege facts showing his interest in the property in controversy, and also facts which entitle him to the immediate possession thereof. Norcross v. Baldwin, 50 Neb. 885; Pennington County Bank v. Bauman, 81 Neb. 782; Paxton v. Learn, 55 Neb. 459; Thompson & Sons Mfg. Co. v. Nicholls, 52 Neb. 312; Griffing v. Curtis, 50 Neb. 334; Camp v. Pollock, 45 Neb. 771; Randall v. Persons, 42 Neb. 607; Musser & Co. v. King, 40 Neb. 892.

Sufficient allegations. A petition, which bases the right of plaintiffs' recovery upon their special ownership in property, under a chattel mortgage, and which contains all of the usual allegations of such pleading in replevin, and alleges the conditions of the note so secured have been broken, is not subject to the objection that it is insufficient to state a cause of action because it does not state that the note has not been paid, or the amount due thereon. Swope & Son v. Burnham, etc., & Co., 6 Okla. 736; Payne v. McCormick Harvesting Machine Co., 11 Okla. 318; Whiteacre v. Nichols, 17 Okla. 387.

Where plaintiff claims right to possession by virtue of a chattel mortgage, the petition must allege that the debt secured remains unpaid. Hudelson v. First Nat. Bank, 51 Neb. 557.

In an action of replevin, a petition which states that plaintiff was a mortgagee in possession of the property, holding it as security for a debt of the mortgagor, at the time it was taken from him by a stranger, states a cause of action. In such case it is unnecessary to

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owners of the goods, wares, and merchandise described as follows, to-wit: (here describe). All the said goods above described being in the city of O., D. county, Nebraska.

2. Plaintiffs allege that said goods, wares and merchandise, above described, are of the value of dollars.

allege a breach of the conditions of the mortgage, to entitle the mortgagee to maintain the action. *Meyer v. First Nat. Bank of Platts-mouth*, 63 Neb. 679.

If the plaintiff is not the absolute owner, the petition must set forth the special ownership or interest of the plaintiff in the property, stating the facts in relation thereto. *Kennett v. Peters & Co.*, 54 Kan. 119.

An allegation of possession under a chattel mortgage, by agreement with the mortgagor, renders unnecessary any allegation of demand of payment of demand notes secured by the mortgage, in order to show the mortgagee's right of possession. *Taylor v. Harle-Haas Drug Co.*, 69 Neb. 546.

In an action of replevin by a mortgagee to recover the possession of the mortgaged chattels an affidavit alleging ownership thereof in the plaintiff is sufficient where the chattel mortgage contains no stipulation retaining title in the mortgagor; especially so where the verified petition in the action sets out the exact nature of the claim. *Bartlett v. Ridgley National Bank*, 70 Kan. 126.

Petition and allegations considered and held sufficient in *Wails v. Farrington*, 27 Okla. 754.

An allegation of general ownership in an action of replevin is not supported by proof of a mere lien or other special ownership. *Sharp v. Johnson*, 44 Neb. 165; *Strahle v. First Nat. Bank of Stanton*, 47 Neb. 319; *Wilson v. City Nat. Bank*, 51 Neb. 87.

One who pleads special ownership cannot recover on proof of general ownership, and vice versa. *Suckstorf v. Butterfield*, 54 Neb. 757; *Parry v. Myton*, 8 Kan. App. 533.

A petition alleging general ownership may be amended so as to allege special ownership instead. *Tackaberry & Co. v. Gilmore*, 57 Neb. 450; *Gray v. Doty*, 77 Kan. 446.

So an amendment changing an allegation of special ownership to general ownership may be made. *Pekin Plow Co. v. Wilson*, 66 Neb. 115, 118; *Weich v. Milliken*, 57 Neb. 86.

A petition or affidavit in replevin may be amended to make general statements more specific and more definite that which is indefinite, and such amendments may have relation back to the inception of the cause. *Swain v. Savage*, 55 Neb. 687.

An amendment of a petition correcting the allegations as to value of the property should be allowed. *McManus v. Walters*, 62 Kan. 128.

Where A brought an action of replevin against B to recover certain chattels, filed the proper affidavit, and obtained an order of delivery,

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3. That the defendant wrongfully and unlawfully detains said goods, wares and merchandise from the possession of plaintiffs, and has wrongfully detained the same for days, to the plaintiff's damage in the sum of dollars.²

701. ACTION BY HEAD OF A FAMILY AGAINST THE SHERIFF CLAIMING THE PROPERTY AS BEING EXEMPT.

Now comes the plaintiff herein and for his cause of action alleges and shows:

1. That this defendant was the duly appointed and qualified sheriff of J. county, Nebraska, from the day of, 19.., to the day of, 19...

2. That the plaintiff is the owner and entitled to the immediate possession of the following described goods and chattels, to-wit: (here describe) being now in the possession of said defendant, and which he still holds, of the value of dollars.

3. The defendant wrongfully detains said goods and chattels from the possession of plaintiff, and has wrongfully detained the same, to plaintiff's damage in the sum of dollars.

4. That said property was seized by said defendant as sheriff of said county, under an execution issued on judgment against the plaintiff, but consisted of articles which are exempt from execution.

5. That plaintiff was, at the time of levying said execution and still is, a resident of this state and the head of a

under which he recovered possession of the property, he cannot afterwards, before the trial, amend his petition by making C a joint defendant with B to recover the property, unless in an affidavit filed before he obtained the chattels in controversy he had charged C with the wrongful detention of the same. *Bardwell v. Stubbett*, 17 Neb. 485.

The petition need not contain averments that the property was not taken in execution on any order or judgment against the plaintiff or for the payment of any fine, tax, or amercement assessed against him, or by virtue of an order of delivery in replevin or in other mesne or final process against him. These allegations are required only in the affidavit to be filed at the commencement of the action. *Daniels v. Cole*, 21 Neb. 156; *Batchelor v. Walburn*, 23 Kan. 517; *Hoisington v. Armstrong*, 22 Kan. 91.

² Form in *Kaufman v. Coburn*, 30 Neb. 672.

family, and he has neither lands, town lots, or houses subject to exemption as a homestead, and he is engaged in the business of agriculture.³

702. ACTION TO RECOVER CERTAIN PERSONAL PROPERTY BY VIRTUE OF A CHATTEL MORTGAGE.

Plaintiff alleges: That he is the owner of the following goods, chattels, property, etc., and is now entitled to the immediate possession of the same. That said property is described as follows, to-wit: (here describe property). That said plaintiff became the owner of said property so as aforesaid described, on the day of, 19.., by virtue of a certain chattel mortgage made, and executed and for a valuable consideration by the said defendants to the plaintiff. That said chattel mortgage covered all of the above described property and that a true copy of the same was duly filed on the day of, 19.., in the office of the register of deeds of L. county, Kansas, according to law in such case made and provided, a copy of which is attached and marked "exhibit A" and made a part hereof.

That after said chattel mortgage was made, executed and delivered by the said defendants to the said plaintiff, the said defendant desirous of purchasing more stock, did on or about the day of, 19.., purchase three bay mares, Oregon raised and bought by said defendants; and the said defendants being desirous of further securing the said plaintiff in his mortgage, authorized, directed and requested the said plaintiff to place said mares as security in said mortgage for the sum of money heretofore loaned by the said plaintiff to the said defendants. That the said plaintiffs at the special instance and request of the aforesaid defendants, did place on or about the day of, 19.., and write the mares in the said mortgage heretofore executed by the said defendants as his security aforesaid.

That said chattel mortgage on said property was given by the defendants to plaintiff to secure the payment of the sum of \$...... mentioned in promissory note, which said note

³ Form in Johnson v. Neal, 32 Neb. 14.

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was on the day of, 19.., at L., Kansas, made, executed and for a valuable consideration delivered by the said defendants to the said plaintiff, due in months from the date thereof and bearing interest at the rate of per cent. from date. That the said plaintiff is now and has been ever since said date, the legal owner and holder thereof together with all rights and causes of action thereunder, a copy of which note is hereunto attached to this petition, marked "exhibit B" and made a part of this petition.

Said plaintiff further says that in said chattel mortgage there is contained the following covenants and conditions, that is to say: (here copy chattel mortgage).

Said plaintiff further says that the aforesaid conditions as above set forth in said petition and set forth in said chattel mortgage were broken, set aside and held for naught by the said defendants in this, to-wit: that the said defendants failed to pay the aforesaid sum mentioned in said note and secured by said chattel mortgage at the time when the same became due and payable or any part thereof and that they now refuse to pay said sum mentioned in said note or any part thereof. And that said sum is wholly due and unpaid and that the said plaintiff, by reason of the failure and neglect of said defendants to pay said sum mentioned in said note, which was secured by the aforesaid chattel mortgage, is now and has been for a long time prior hereto, the owner of the aforesaid property described in said chattel mortgage and that he is now entitled to the immediate possession of the same.

And plaintiff further says that on the day of, 19.., he duly demanded the possession of all of the aforesaid property described in said chattel mortgage, which demand for possession of said property of the said defendants was then and there refused and at the date of the demand so as aforesaid made by the said plaintiff upon the said defendants for the possession of the said property, he, the said plaintiff, was entitled to the immediate possession of the same. Plaintiff says that the said defendants wrong-

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fully and unjustly retain in their possession the aforesaid property so as aforesaid described, in the aforesaid chattel mortgage and have so wrongfully and unjustly retained in their possession the aforesaid property from the said plaintiff since the day of, 19.., and wholly deprived said plaintiff from all use and benefit thereof, to his great injury and damage in the sum of dollars.

Wherefore, said plaintiff prays an order to issue against the said defendants and that they may be ordered to deliver to the said plaintiff all of the aforesaid goods, chattels and personal property so as aforesaid described and in case delivery of the same cannot be had for judgment against the said defendants for the sum of dollars the value of said goods, chattels and personal property and also for a judgment against the said defendants for the sum of dollars his damages as aforesaid sustained by reason of the wrongful and unlawful detention of the said goods and chattels and personal property and for the costs herein and for such other and further relief as the court may deem proper.⁴

⁴ From form in record in *Lawson v. Robinson*, 68 Kan. 737.

Order of delivery. The right to maintain an action of replevin does not depend upon the taking out of an order of delivery at or after the commencement of the action. *Varner v. Bowling*, 54 Kan. 380; *Batchelor v. Walburn*, 23 Kan. 517.

An action may be maintained although no affidavit in replevin is filed. *Lamont v. Williams*, 43 Kan. 558.

Affidavit is necessary only when an order of delivery is desired by the plaintiff. *Racine-Sattley Co. v. Meinen*, 79 Neb. 32, 33; *Case Threshing Machine Co. v. Rosso*, 78 Neb. 184.

The affidavit of a plaintiff in an action of replevin to obtain an order for the delivery of the property, is no part of the pleadings, and the facts therein set forth form no part of the issues in the case. *Hoisington v. Armstrong*, 22 Kan. 91; *Crawford v. Furlong*, 21 Kan. 501; *Hudelson v. First Nat. Bank*, 51 Neb. 557; *Jantzen v. Emanuel Baptist Church*, 27 Okla. 473.

Where both an affidavit and a petition or bill of particulars are filed, the office of the affidavit ceases when the property is delivered and jurisdiction conferred, and the action thereafter proceeds upon the petition. The affidavit is not a part of the pleadings in the district court. *First National Bank v. Cochran*, 17 Okla. 538.

Averments of affidavit jurisdictional. The provisions of the Civil Code, stating what averments shall be made in an affidavit in replevin,

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703. ACTION FOR THE POSSESSION OF CERTAIN PERSONAL PROPERTY SETTING UP SPECIAL OWNERSHIP BY VIRTUE OF A CHATTEL MORTGAGE.

The plaintiff complains of the defendant and for his cause of action against him alleges and states:

1. That the plaintiff has a special ownership and interest

are jurisdictional, and must be complied with. It is held, however, that an affidavit which omits the statement that the property had not been seized by virtue of an order of delivery issued under this article is sufficiently complied with by an averment in the affidavit that the property had not been taken under execution by an order of the court. *Scott v. Jones*, 7 Okla. 42; *Westernberger v. Wheaton*, 8 Kan. 121.

An affidavit which sets forth the requisite averments required by the code, excepting that there is omitted therefrom the statement that the plaintiff "is entitled to the immediate possession of the property," and no words equivalent are used, is fatally defective. *Paul v. Hodges*, 26 Kan. 225.

The affidavit containing an averment that plaintiff was owner and entitled to the immediate possession of the property constituting the subject of the action is *prima facie* good, as an allegation of absolute ownership—notwithstanding such ownership was alleged to have been based upon a chattel mortgage—when attacked by a motion in the nature of a demurrer. *Vinnedge v. Nicholai*, 28 Neb. 133.

When an action of replevin is removed to the district court by appeal, it is not necessary to file a new affidavit. *Dodd v. Skelton*, 65 Neb. 585.

The mere fact that the replevin affidavit failed to state the value of each article, will not justify a reversal of the case. *Boyce v. Augusta Camp No. 7429, M. W. A.*, 14 Okla. 642.

In an action of replevin in a justice's court, the plaintiff may, if he chooses, and with the permission of the justice, use and treat his affidavit for the summons and order of delivery as a bill of particulars. *Starr v. Hinshaw*, 23 Kan. 378.

The replevin affidavit may be amended to conform to the allegation of ownership contained in the petition. Such amendment may be allowed by the court while the issues formed by the pleadings are being tried before a referee. *Tackaberry & Co. v. Gilmore*, 57 Neb. 450; *Crans & Hazlett v. Cunningham*, 13 Neb. 204; *Lewis v. Connolly*, 29 Neb. 222.

The original affidavit in replevin may be amended so as to state sufficiently what is already stated therein indefinitely. *Meyer Bros. v. Lane*, 40 Kan. 491; *Wilson v. Macklin*, 7 Neb. 50.

A demand for possession of the property is not a condition precedent, even where the original taking was not tortious or wrongful. *Citizens' State Bank of Lawton v. Chattanooga State Bank*, 23 Okla. 767; see *Burchett v. Purdy*, 2 Okla. 391.

in the following described goods, chattels and personal property, to-wit: (describe property).

2. That plaintiff's special ownership and interest in said property is as follows: that on the day of,

Where a defendant is rightly in possession of property the plaintiff must demand possession thereof before bringing an action of replevin, otherwise the defendant will not be liable for costs. *Peters v. Parsons*, 18 Neb. 191.

In an action to recover personal property, the possession of which it is claimed was obtained by false and fraudulent representations, a demand is not necessary before commencing the action. *Salisbury v. Barton*, 63 Kan. 552.

No notice to the officer at the time of the levy that it is claimed as exempt, and no demand for the return prior to suit against the officer, are necessary. *Seip v. Tilghman*, 23 Kan. 204.

An undivided interest in personal property cannot be replevined. *McDonald v. Bailey*, 25 Okla. 849.

Joint owners of chattel property should join in an action for recovery of its possession. *Honaker v. Vesey*, 57 Neb. 413; *Seip v. Tilghman*, 23 Kan. 204.

One tenant in common cannot maintain replevin for the possession of any of the common property against his cotenant, nor against one in possession of the property as the joint agent of the tenants in common. *Smith-McCord Dry Goods Co. v. Burke*, 63 Kan. 740.

A subsequent mortgagee cannot maintain replevin for the possession of the mortgaged property in the possession of the prior mortgagee or his agent until after such prior mortgage has been satisfied. *Smith-McCord Dry Goods Co. v. Burke*, 63 Kan. 740.

An agent who takes in his own name a bill of sale of personal property in payment of a debt due to his principal, and who upon taking possession of the property for his principal is dispossessed of it by third parties, cannot maintain replevin in his own name for its repossession under a general allegation of ownership in himself, without stating the facts in relation to his special interest and right of possession. *Ward v. Ryba*, 58 Kan. 741.

Damages are not recoverable unless the plaintiff is entitled to the possession of the property. *McMillan Hardware Co. v. Ross*, 24 Okla. 696.

Where special damages are claimed they must be specially alleged. *Whitney v. Levon*, 34 Neb. 443; *Armagost v. Rising*, 54 Neb. 763; *Rosecrans v. Asay*, 49 Neb. 512.

Where the plaintiff has obtained possession of the property and fails to prosecute or maintain his action, because of a defect in his petition, the defendant is entitled to judgment and to a trial of his right of property or possession, for the purpose of establishing his damages. *Pennington Co. Bank v. Bauman*, 87 Neb. 25.

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19.., the defendant, to secure the payment of one certain promissory note for the sum of \$., signed and executed by the defendant and one J. C., payable to this plaintiff, under the name of S. C. A., dated the day of, 19..,

Damages. *Dolan v. Van Demark*, 35 Kan. 304.

Possession of defendant. Replevin will not lie against a person who is neither in the actual nor constructive possession of the property sought to be recovered, at the commencement of the action. *Davis v. Van De Mark*, 45 Kan. 130.

The action runs against the party in possession, and if he be an officer acting under an execution, he may be sued as an individual or as an officer. *Irwin v. Walling*, 4 Okla. 128.

The action of replevin cannot be maintained against one having the right of possession. *Rucker v. Donovan*, 13 Kan. 190.

The ordinary rules of pleading do not apply in replevin. A party may prove fraud under general allegations of ownership and right of possession. *Woodbridge Bros. v. DeWitt*, 51 Neb. 98; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228; *Pekin Plow Co. v. Wilson*, 66 Neb. 115; *Salisbury v. Barton*, 63 Kan. 552.

In an action against a railroad company to recover property in its possession it is not necessary to allege that the railroad runs into or through the county in which the suit is brought. *Atchison, Topeka and Santa Fe Ry. Co. v. Jordon Stock-Food Co.*, 67 Kan. 86.

The judgment. In an action of replevin, where the defendant retains possession of the property, the judgment for the plaintiff should be in the alternative for a return of the property, or for its value in case a return cannot be had; and such judgment should be rendered although the plaintiff may only ask in his petition for the recovery of the possession of the property. *Chase County National Bank v. Thompson*, 54 Kan. 307.

Variance between petition and verdict and judgment. *Hayes v. Slobodny*, 54 Neb. 511.

While, under certain conditions, replevin will lie to recover possession of a building, a petition in replevin for the recovery of a building, in order to state a good cause of action, should specifically aver such a state of facts as will clearly show that such building is personal property, and that the plaintiff has a right to maintain the action. It is not sufficient to aver generally that such building is personal property. *Bridges v. Thomas*, 8 Okla. 620.

An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is insufficient to give him a standing in court. *Moline, Milburn & Stoddard Co. v. Hamilton*, 56 Neb. 132; see *Bohart Com. Co. v. Buckingham*, 62 Kan. 658.

Description of property. *Barse Live Stock Commission Co. v. Turner*, 56 Kan. 778.

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and due on the day of, 19.., made, executed and delivered to the plaintiff, under said name of S. C. A., a chattel mortgage on the following described personal property, to-wit: (describe property and location), in B. county, Nebraska; and that said chattel mortgage was duly filed in the office of the county clerk of B. county, Nebraska, on the day of, 19.., and now remains of record therein, a true copy of said mortgage being hereto attached, marked "exhibit A," and made a part of this petition.

3. That said promissory note, aforesaid, was given by said defendant and said J. C., in payment of the rental for the premises above described, for the year commencing, 19.., and ending, 19..; that the plaintiff is now the lawful owner and holder of said note; that no part thereof has ever been paid and that there will be due this plaintiff thereon, at maturity, the full sum of \$.....

4. Plaintiff further alleges and says that since the execution and delivery of said chattel mortgage, aforesaid, the acres of growing wheat, therein described, has matured, and ripened and that the same has been harvested and threshed by the said defendant; that the amount of wheat so harvested and threshed by said defendant from said acres of growing wheat, aforesaid, was about bushels and that at the time of the threshing of said wheat the same was stored by said defendant in the barn, house and corn crib on the premises above described, and that the same or the larger portion thereof is now so stored therein; that by virtue of said chattel mortgage aforesaid the plaintiff has a special ownership and interest in and lien upon the whole of said bushels of wheat; that the bushels of wheat described in the first paragraph of this petition, is a part of the identical wheat matured, ripened, harvested and threshed from the acres of growing wheat described in the aforesaid chattel mortgage, and so as aforesaid stored by the defendant, and that this plaintiff has a special ownership and interest therein, by virtue of said chattel mortgage.

5. Plaintiff further alleges that said chattel mortgage, aforesaid, contains the following express covenant and condi-

tion, to-wit: (here insert express covenant and condition).

6. Plaintiff further alleges and says that by reason of the failure or partial failure of the corn and oat crops on said premises, the acres of growing corn and the acres of growing oats, included in said mortgage, are of but little value and are wholly insufficient security for the said \$. note, aforesaid; that by reason of the harvesting and threshing of said wheat and the placing of same in bin, as aforesaid, the said defendant has changed the nature and description thereof to such extent that plaintiff's said mortgage and the said public record thereof, would no longer be notice to innocent purchasers or subsequent mortgagees, for value, of plaintiff's lien or interest therein, and that said defendant has refused to give plaintiff a specific lien on said wheat so in bin on said premises, to secure said note, aforesaid, though frequently requested so to do; that said defendant has wrongfully and unlawfully sold and disposed of a portion of said wheat, since the same was so harvested, threshed and placed in bin as aforesaid, without the knowledge or consent of the plaintiff, and that said defendant is now threatening and attempting to sell mortgage or otherwise dispose of or encumber the remainder of said wheat; that J. C., the co-maker of said promissory note, with the defendant, died on the day of, 19.., wholly insolvent, and that the defendant is now wholly insolvent.

7. That by reason of the facts set out in the preceding paragraph, the plaintiff now deems himself unsafe and insecure, and the said condition of said chattel mortgage has become broken; said mortgage has become absolute and the plaintiff is now entitled to the immediate possession of the personal property described in the first paragraph of this petition; that on the day of, 19.., this plaintiff demanded the possession of said personal property, aforesaid, to-wit: bushels of wheat in bin on the premises above described, from the defendant, under said chattel mortgage, but that the defendant refused to surrender the possession thereof to the plaintiff; that the defendant now wrongfully detains

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said personal property from the possession of the plaintiff and has wrongfully detained the same for the space of days to the plaintiff's damage in the sum of \$.

Wherefore, the plaintiff prays for judgment against the defendant for a return of said personal property, to-wit: about bushels of wheat in the bin, said wheat being now stored in the barn, house and corn crib, situate on (give location), in B. county, Nebraska, or for the value thereof if the same cannot be returned, and for his damages and the costs of this suit.⁵

704. PETITION IN ACTION OF REPLEVIN WHERE NO ORDER OF DELIVERY IS ASKED.

The plaintiff says that at F. S., Kansas, on 19.., the defendants wrongfully detained from this plaintiff, and still detain in their possession, the goods and chattels of this plaintiff, to-wit (here follows a description of the property, location and value).

The plaintiff is the owner of said property, and entitled to the immediate possession thereof. The defendants, although due demand has been made, refuse to deliver possession of said property to plaintiff.

Wherefore she brings this her action in replevin, to recover the possession of the same, and costs of suit, and asks judgment accordingly.⁶

705. ACTION FOR GOODS OR THEIR VALUE.

Plaintiff complains of said defendant, and says: that plaintiff is entitled to the immediate possession of the following described goods, and that he is the owner of the said goods, to-wit: (here describe). Plaintiff alleges that said defendant wrongfully detained said goods for the space of one day; that said plaintiff was detained at M., Kansas, for the space of two days, by reason of not getting possession of said goods, to his damage in the sum of dollars.

Plaintiff therefore demands judgment for the immediate possession of said goods, or in case he cannot get possession,

⁵ From form in record in *Allen v. Cerny*, 68 Neb. 211.

⁶ Form in *Batchelor v. Walburn*, 23 Kan. 517.

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for the value thereof, together with dollars damage, and costs of suit in the case.⁷

706. ACTION FOR POSSESSION OF PROPERTY ALLEGING SPECIAL OWNERSHIP BY VIRTUE OF A CHATTEL MORTGAGE.

The plaintiff complains of the defendant for that on the day of, 19.., the defendant made, executed, and delivered to the plaintiff a chattel mortgage in words and figures following, to-wit: (here set out mortgage).

2. That the promissory note secured by said mortgage is now due and has not been paid.

3. That affiant has special ownership in the above described property, and is entitled to the immediate possession of the same. That said goods and chattels are wrongfully detained from him by said defendant, and that said goods and chattels were not taken in execution or on any order of judgment against plaintiff, or for the payment of any tax, fine, or amercement issued against him; or by virtue of any order of delivery issued under the chapter of the Code of Civil Procedure providing for the replevin of property, or on any other mesne or final process issued against said plaintiff.

Wherefore the plaintiff prays for judgment against the defendant for the possession of the said property, or, in case possession thereof cannot be had, for a judgment against the defendant for the value thereof and for the costs herein expended.⁸

⁷ Form in *Smith v. Findley*, 34 Kan. 316.

⁸ Adapted from form in *Rodgers v. Graham*, 36 Neb. 730.

Form of petition in replevin of property claiming right to possession by virtue of a chattel mortgage. *Nutt v. Humphrey*, 32 Kan. 100.

Form of petition in replevin where property was sold under a conditional sale in Arkansas and removed to Oklahoma. *National Cash Register Co. v. Paulson*, 16 Okla. 204.

Form of petition in action for possession of property alleging sale of goods on credit induced by fraudulent representations as to ability to pay. *McKinney v. First Nat. Bank of Chadron*, 36 Neb. 629.

Form of petition in which plaintiff claims right to possession of certain personal property by virtue of a chattel mortgage. *Ostertag v. Galbraith*, 23 Neb. 730.

Allegations where replevin is brought by a voluntary association. *McLaughlin v. Wall*, 81 Kan. 206.

CHAPTER LVIII.

SPECIFIC PERFORMANCE.

- 707. Action for the specific performance of an oral contract of adoption and to give plaintiff one-half of an estate at death.
- 708. Action to compel specific performance of contract to convey real estate.
- 709. Action to compel specific performance of a contract for the sale of real estate.
- 710. Action for specific performance of contract by deceased to adopt plaintiff as a child and to make a settlement of property in consideration of personal services rendered.
- 711. Petition to enforce contract for sale of land.

707. ACTION FOR THE SPECIFIC PERFORMANCE OF AN ORAL CONTRACT OF ADOPTION AND TO GIVE PLAINTIFF ONE-HALF OF AN ESTATE AT DEATH.

Plaintiff complains of defendants and alleges:

1. That the defendant L. B. is the wife of defendant J. A. B.; that the defendants M. B., G. B., G. B. and H. B. are the children of the defendant J. A. B. and are all four minors under the age of eighteen years and have no guardian; that the defendant J. A. B., administrator with the will annexed of the estate of J. H. B., deceased, was by the county court of C. county duly appointed as such administrator with the will annexed on or about , 19..; that immediately thereafter he duly qualified as such administrator with the will annexed of said estate, and ever since said time has acted and is still acting as such administrator.

2. That plaintiff's maiden name was S. M. N.; that her father's name was S. N.; that plaintiff's mother departed this life in the year; that plaintiff was born , ...; that defendant J. A. B. was born , ... , and was the step-son of said J. H. B.; that in the month of , ... , plaintiff's father, with his family of seven children, including plaintiff (plaintiff's mother hav-

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ing died the previous), was living upon and cultivating a rented farm in C. county, State of Nebraska; that some time in said month, the exact day being unknown to plaintiff, the said J. H. B. came to the home of plaintiff's father and represented to him that he, the said J. H. B., had no daughter; that he desired to obtain a little girl to adopt and raise as a daughter and that if plaintiff's father would let him have one of his little girls that he would take her into his family and adopt her as his own and when he died would leave her one-half of his entire estate, and solicited plaintiff's father to let him have plaintiff upon those terms; that plaintiff's father, after first objecting to parting with any of his children, finally, in the interest and for the use and benefit of plaintiff, accepted the said proposition of said J. H. B.; and thereupon, at the said time and place, the said J. H. B., acting for himself, and plaintiff's father, S. N., acting in the interest and for the use and benefit of plaintiff, entered into an oral contract in and by which said oral contract it was mutually agreed that the said J. H. B. should take plaintiff into his family and adopt her as his own child and at his death leave her one-half of his estate; that is to say, one-half of all the estate, real, personal, or mixed, of which he might be seized at the time of his death; that in consideration of said agreement on the part of said J. H. B., plaintiff's father then and there delivered the plaintiff to the said J. H. B. and surrendered all claim to and custody and control over the plaintiff; that at said time the said J. H. B., in pursuance of said agreement, took the plaintiff, then a little girl eight years of age, to his home, where she continued to live with the said J. H. B. and his wife, in the family of said J. H. B., for about eighteen years, when, with the full consent of said J. H. B., she married her present husband; that during all the years she lived in the home of said J. H. B. she faithfully and dutifully performed the services and rendered the obedience, love and affection of a daughter to the said J. H. B. and his wife, and in his home; that she was given the name of B. by the said J. H. B. and his wife, and was at all times after the said month of, ..., spoken of by the said J. H. B. and his wife as their daughter, and in con-

sideration of said contract, and in part performance thereof, plaintiff and her father, S. N., both consented to and acquiesced in the giving up of her own name and the taking of the name of said J. H. B., and during all the said time from the said month of, ..., to the times of the death of J. H. B. and his wife respectively, she recognized them as and called them "father" and "mother"; that while living in the home of said J. H. B., and when she was in her sixteenth year, with the full knowledge and approval of said J. H. B., she was baptized as S. M. B., in the church of which said J. H. B. was a deacon; that during all the time from the said month of, ..., to the time of her marriage, she with the full knowledge, consent and direction of the said J. H. B., went by the name of B. in the community where they resided in the school which she attended, and among all the relatives and neighbors of said J. H. B.; that between the month of, ..., and the time of his death the said J. H. B., having in mind and referring to the contract hereinbefore set out, stated and declared at divers and sundry times and to divers and sundry persons that when he died plaintiff was to and would have one-half of his estate, at said time referring to plaintiff as "my child," "my little girl," and "my daughter."

4. That plaintiff and her said father, S. N., have fully performed all the terms and conditions of said contract on their part, but the said J. H. B., in utter disregard of plaintiff's long and faithful services as aforesaid, and in violation of said contract of, ..., failed and neglected to legally adopt plaintiff, and on, 19.., departed this life leaving a last will and testament in and by the terms of which said will, he, the said J. H. B., bequeathed to the defendant J. A. B. all of his personal property, and devised and bequeathed all of his real estate to said J. A. B. for and during his lifetime, and upon the death of said J. A. B. then in fee simple in equal parts to the defendants M. B., G. B., G. B. and H. B.; the defendant H. B. being then not yet named and being referred to in said will as "baby B."; that no provision was made for plaintiff in said will, nor did said J. H. B. in his lifetime ever convey to plaintiff one-half of his estate or any

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portion thereof, or otherwise provide for plaintiff, as provided and called for in said contract.

5. That at the time of his death the said J. H. B. was the owner and in possession of the following lands situated in the county of C. and State of Nebraska, viz.: (describe property), then of the value of \$. and now of the value of \$.; and also owned and possessed personal property of the value of \$.; that he left no debts or encumbrances of any kind against or upon any of said real or personal property outside of plaintiff's interest in said estate as hereinbefore set forth, and the time has long since elapsed for the filing of claims against said estate.

Wherefore plaintiff prays the court to appoint a guardian *ad litem* for said minor defendants; and to enter its decree herein as follows:

(a) Authorizing and requiring said administrator with the will annexed to convey to plaintiff an undivided one-half of said lands and premises and personal property in the same manner as said J. H. B. might and ought to have done if living, within a short time to be filed by the court; and in the event of his failure so to do that the said decree stand as and for said deed.

(b) Requiring defendants to pay the costs of this suit.

(c) That plaintiff have such other, further and additional relief as justice and equity may require.¹

706. ACTION TO COMPEL SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY REAL ESTATE.

Plaintiff states that the said defendant, J. O., is the mother and only heir of A. T. O., deceased; that said A. T. O. died intestate, on the day of, 19..; that in the lifetime of said A. T. O., and on or about the day of, 19.., said A. T. O. entered into an agreement with the plaintiff, whereby he agreed to sell, and did sell, to the said plaintiff, the following tract of land, lying and situate in the county of, and State of Kansas, described and bounded as follows, to-wit: (here describe); and to convey the said

¹ From form in record in *Peterson v. Bauer*, 83 Neb. 405.

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lands to the said plaintiff by deed of general warranty, on the payment of dollars, and at the time when said A. T. O. should purchase said land, the lands at that time being school lands. That said A. T. O., under said contract of sale, delivered to said plaintiff the possession of said premises; that said plaintiff has been in possession of said lands ever since, has paid the full purchase price therefor to the said A. T. O. and made lasting and valuable improvements thereon, consisting of fencing, setting hedge, building corrals, and otherwise improving the lands to the value of dollars and more. And the said plaintiff avers that he has always paid the taxes and assessments of every nature on said premises. And said plaintiff avers that on the day of, 19.., said A. T. O. purchased said lands from the State of Kansas; that on the day of, 19.., the governor of the said State of Kansas issued his patent to said lands to one J. F. O., administrator of the estate of said A. T. O., deceased, for the benefit of the heirs of said A. T. O.; that neither said lands, nor any part thereof, have passed to the administrator of said estate, as assets belonging to said estate, but descended to said defendant, as the sole heir of said A. T. O.; that said O. did not in his lifetime execute a deed of conveyance to said M., nor has his administrator, nor his heirs, executed to said J. M. since the decease of A. T. O. a good and sufficient deed of conveyance, or any deed of conveyance whatever, conveying said land, or any part thereof, to said plaintiff, or any person for him, but have refused, and still refuse, to execute said deed.

Wherefore, etc.²

709. ACTION TO COMPEL SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REAL ESTATE.

Plaintiff alleges: That on and prior to the day of, 19.., said defendant was the owner in fee simple of the following real estate, to-wit: (here describe).

That on said date said plaintiff and wife composed a firm and were engaged in the real estate business in D. city, F.

² Form in O'Neill v. Martin, 26 Kan. 494.

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county, Kansas, under the firm name of G. L. P. & Co. That on said date said plaintiff & Co. were the duly authorized agents without writing of the said defendant for the purpose of selling said real property above described at an agreed price of dollars per acre, and that the said firm were not agents for said defendant for the purpose of selling any other real estate except land in F. county, Kansas.

That on said day of, 19.., the said plaintiff & Co. as agents as aforesaid for the said defendant, entered into a written contract with one A., a copy of which said contract is hereto attached marked "A" and made a part of this petition. That in and by the terms of said contract the said defendant through his said agents (plaintiff above) sold to said A. all of the real estate hereinbefore described at the price of \$...... per acre, to be paid one-half cash within days from the date of said contract, provided title was furnished, and the remaining one-half of the said purchase price to be paid within years with interest at the rate of per cent. That at the time of the execution of said contract the said A. paid to the said defendant the sum of \$...... on account of said sale and purchase.

That the said defendant knew of the said sale and of the execution of the said contract and approved, ratified and signed the same on the said date.

That said defendant pointed out said real estate to said A. before execution of contract, that A. and this plaintiff all well knew the location of the said land, and that it was owned by said defendant, and plaintiff & Co. as his agents were authorized to sell for him, and said land was the land intended to be described and conveyed by the said contract "exhibit A."

That thereafter and for a valuable consideration the said A. in writing duly assigned to plaintiff contract "exhibit A" and all right, title and interest of the said A. therein, that B., the wife of A., who was then a resident of Kansas, is still living and was fully aware of the said assignment at and after the time the same was made and verbally consented thereto has at no time objected, but has at all times approved the said assignment of contract "exhibit A," that said assignment has

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been lost or destroyed and this plaintiff is unable to attach a copy thereof to this petition.

Plaintiff alleges that said defendant well knew of the said assignment by the said A. to this plaintiff and approved and ratified the same verbally and consented thereto. That thereby this plaintiff became the owner and holder of all rights under the said contract and was entitled upon performance on his part to a specific performance of the same.

That said A. and the plaintiff sold the tract of land described and the said defendants ratified the sale and as a part execution of the contract said defendants duly executed and delivered a warranty deed conveying the last named tract (with other land) to said B., said deed bearing date and having been executed on , 19...

Plaintiff further alleges that under date of , 19.., the defendant signed a general warranty deed conveying to said A. for the consideration of \$. all of the real property hereinbefore described except the aforesaid tract which was conveyed to B.; that the defendant signed said deed at a later date and that in the meantime the deed was left with a notary public in D. city, Kansas, to be certified and acknowledged when the defendant should sign the same; that on or about the day of , 19.., the defendant delivered the said deed to the N. B. of C. of D. city, Kansas; that the said deed bore no certificate of acknowledgment; that a true copy of said deed is attached hereto marked "B" and made a part of this petition. Plaintiff alleges that by mutual mistake of all the parties to said contract "exhibit A" the county and state, township and range were omitted from the description in the said contract, but all of the parties well understood what lands were intended to be described and conveyed by the said contract, and said plaintiff asks that said contract "exhibit A" may be reformed so that the same shall conform to the intention, agreement and understanding of all the parties thereto by making the contract show the description and where situated. Plaintiff further alleges that on or about the day of , 19.., he duly sold to one C. acres of the lands described in said "exhibit A"; that

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said sale was under a written contract, a copy of which is hereto attached as "exhibit C" and made a part of this petition.

That said defendant knew of said sale and consented thereto.

Plaintiff alleges that on the day of, 19..., said defendant, this plaintiff, and said C. mutually agreed orally that on the day of, 19..., plaintiff and said C. should deposit in the N. B. of C. one-half the cash provided in said contract "exhibit A" and note for the balance due in two and three years, with interest at per cent., secured by mortgages on said real estate; that the change of the time of the deferred payments so as aforesaid verbally agreed to was at the special instance and request of the defendant; and that it was agreed further that at said time and place the defendant should deposit for exchange for said cash and securities a good and sufficient warranty deed to the said real estate, conveying to C. the acres of said lands above described in said "exhibit C," and a good and sufficient deed conveying to this plaintiff the other remaining acres of the said lands (here describe). That at said time and place mentioned, this plaintiff and his sub-vendee had then and there in the hands of the said N. B. of C. of D. city, Kansas, the said sum in cash and the said securities in full compliance with the terms and conditions of said contract "exhibit A" as modified, and that the said defendant then and there refused and still refuses to this day to comply with the contract upon his part or to deliver to this plaintiff and his sub-vendee the conveyance hereinbefore mentioned, and refused and still refuses to accept the cash required by said contract and the securities therein provided; plaintiff alleges that he was ready to perform on his part the conditions of said contract "exhibit A," but that because of said defendant's request as aforesaid and plaintiff's oral consent thereto plaintiff omitted literal compliance with and tendered performance of said contract "exhibit A" and complied instead with the request of the defendant as aforesaid as to such performance in the particulars mentioned.

Wherefore, the plaintiff prays the court to decree and ad-

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judge that the said defendants be required to execute to this plaintiff a good and sufficient conveyance of said real estate as said defendants are in duty bound to do and that in default of such conveyance within ten days from the date of the decree herein the decree of this court operate as a conveyance of said real estate to this plaintiff. Also that the court will adjudge and decree that this plaintiff have and recover from the defendants his damages for the breach of said contract as to all of said real estate so affected by the defendant's breach and for costs of this suit; and for all other and further proper equitable relief.³

710. ACTION FOR SPECIFIC PERFORMANCE OF CONTRACT BY DECEASED TO ADOPT PLAINTIFF AS A CHILD AND TO MAKE A SETTLEMENT OF PROPERTY IN CONSIDERATION OF PERSONAL SERVICES RENDERED.

Plaintiffs state that they are now and have been husband and wife since the day of, 19... That on or about the day of, 19..., N. C. T. came to the city of, ..., at the age of years, and her name was then N. C. M.; that she was poor and had to support herself. That she then and there met and agreed with R. M. F. and V. F., his wife, in said city. Said agreement between said parties was in substance as follows, to-wit: That said N. C. M. was to go to the home and house of said R. M. F. and V. F., who then had no children, and to live with them as their child, doing and serving them as their child, with the promise and agreement that they would legally adopt her as their child. That in pursuance of said agreement she went immediately to their house as such child, with the full knowledge and consent of said parties, and entered into said relation, discharging all her duties as their child with the full understanding of all of said parties that she was to be so adopted, and at their death she was to receive and inherit all their property. And she continued to reside, and discharge all her duties as such child, such as working in and around their said home, doing cooking, sweeping, sewing, general

³ From form in record in *Painter v. Fletcher*, 81 Kan. 195.

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household duties, and bestowing upon them a child's affections to their entire satisfaction and in full compliance of their said agreement until about the day of, 19.., when said R. M. F. died at said city, leaving no children.

That said female plaintiff from said day continued to reside with said V. F. as her child, under the other and further agreement between said V. F. and said female plaintiff, that she was to continue to so reside and act with her in the relation aforesaid, and at her death she was to receive and inherit all of said V. F.'s property. That she did continue to reside with her, said V. F., under the agreement made with her after the death of her said husband, doing and performing the things and work for her in like manner as she did before his said death, and as hereinbefore stated, until about the day of, 19.., when she was married to plaintiff, C. T., which said marriage was contracted and entered into with the full knowledge and consent of said V. F. The plaintiffs then, with the consent of V. F., went to live by themselves.

That afterwards said V. F. requested plaintiffs to come to her house in and take care of her during her old days. That in compliance with said request, they resided with her and took care of her for about five years, discharging all of said duties as her said child, with the further promise that she, the female plaintiff, at the death of said V. F. was to receive all of her property.

That said F. during all of said time received and accepted her said work and services under said agreement. That plaintiff, relying upon and believing she had been so adopted as such child by said V. F., continued to work and perform her said duties as aforesaid, and received nothing for said labor except her board and clothes, to the entire satisfaction of said F.

That defendants knew of the relation, and well understood that this female plaintiff was to so inherit their said property.

That V. F. died about 19.., intestate, at the city of, leaving as her only collateral kindred and heirs at law these defendants.

That the said female plaintiff did not know or find out that

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she was not regularly and legally adopted as their said child until after their death in 19... , but expected at that time that she would receive all of her said property.

That said V. F. at her death was seized of the following described real estate, to-wit: (describe) and personal property after paying all of the debts of said estate, amounting to dollars, which is now in the hands of A. T. K., defendant, who administered upon the estate of said V. F.

Wherefore plaintiffs pray the court to declare specific performance of said agreement, and to that end that, all right, title, interest and estate in and to said real estate which the said V. F. had at the time of her death, and which vested in defendants as heirs at law of said V. F. be divested out of them and that the same be vested in the plaintiff, N. C. T., and that the rights of said plaintiff to the personal estate of said deceased and remaining in the hands of said administrator be declared and established, and the rights of said plaintiffs in and to said estate be established as fully to all intents and purposes as though she had been formally and lawfully adopted as a child and heir at law of said deceased, and for all other proper relief.

711. PETITION TO ENFORCE CONTRACT FOR SALE OF LAND.

Plaintiff states that on the day of, the defendant, W. N. W., owned and was in possession of a certain stock of merchandise situated in the city of, ... county, ...; that on said day of, one E. D. owned and was in possession of the following described real estate in county, ..., to-wit: (describe) that on said day of, said defendant W. and one T. J. D., father of the above-named E. D., entered into a contract in writing, by which it was mutually agreed that said W. was to and did thereby sell to said T. D. said stock of merchandise, and that said E. D. was to sell and convey to said W. the above described real estate, said contract being in words and figures as follows: (set out contract in full).

That said contract was duly executed by said W. N. W. and T. J. D., and witnessed by B. L. W. and R. L. W. and had

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attached thereto and canceled as the law directs dollars of internal revenue stamps, which said contract is not herewith filed for the reason that the same is in possession and under the control of the defendant.

Plaintiff further states that in the purchase of said stock of merchandise and in the making of the contract aforesaid for the purchase of said stock of merchandise the said E. D. was a party thereto and was with his father, the said T. J. D., the purchasers thereof, notwithstanding that said contract for the purchase and payment for said merchandise was made in the name of said T. J. D. alone; that in making said contract with said W. for the sale and conveyance to said W. of the real estate above described, while the same was made in the name of said T. J. D. alone, yet in truth and in fact said E. D. as owner in fee simple of said real estate was the real party in interest in the contract as aforesaid for the sale of said real estate to said W., and that in making said contract of sale of said real estate, said T. J. D. was the agent of said E. D.

Plaintiff further states that after said contract had been entered into for the sale of said real estate and before said E. D. had conveyed the same to said W., she became the purchaser of said real estate from said E. D., and on the day of, 19.., received from him a general warranty deed to said real estate, subject, however, to said contract of sale to said W., of which said contract of sale plaintiff had full knowledge, and upon which she relied and which she assumed and which she has always been ready and willing and is yet ready and willing to carry out and perform.

Plaintiff further states that all the terms and conditions of said contract in the purchase of said stock of merchandise and in the payment therefor on the part of said T. J. D. and said E. D. and that said sum of dollars has been fully paid to said W. N. W. in all respects according to the terms of said contract.

Plaintiff further states that after said T. J. D. and said E. D. had fully complied with all the terms and conditions of said contract in regard to the purchase and payment for said stock of merchandise and after said sum of dollars had

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been duly paid to said W. under the terms of said contract, and on the day of, 19.., she tendered to said W. a general warranty deed duly executed and acknowledged by plaintiff and her husband, E. M. R., conveying the fee simple title to said above described real estate to said W. as shown by an abstract of title which she then and there furnished at the time. But defendant refused and has ever since refused to accept said deed and to pay plaintiff the purchase money, to-wit, ... dollars.

Wherefore plaintiff prays for a decree of court ordering and directing the defendant to accept said deed and to pay to plaintiff the purchase money, to-wit, ... dollars, and that plaintiff may have judgment against defendant for said sum of dollars, and for all proper equitable relief with costs of suit.⁴

4 Insufficient allegations. Where the petition sets forth a contract as a foundation for a decree for the specific performance thereof, and such contract on its face appears to be void, and the petition does not set forth any facts which would show that such contract is not void, such a petition does not state facts sufficient to constitute a cause of action. *Clough v. Hart*, 8 Kan. 325.

A petition filed by the vendors to enforce a contract for the sale and purchase of land is fatally defective, which contains no averment of a tender of conveyance and alleges no excuse for the failure to make such a tender. *Soper v. Gabe*, 55 Kan. 646.

One cause of action. Where a petition sets forth facts sufficient to constitute a cause of action for the specific performance of a contract to sell and convey real estate, and also to authorize a recovery of damages for the refusal on the part of the defendant to specifically perform his contract, and prays that the defendant may be compelled to specifically perform his contract, or that, if for any sufficient reason a specific performance of the contract cannot be compelled, then that the plaintiff may recover damages, only one cause of action is stated in the petition, and several causes of action are not improperly joined. *Henry v. McKittrick*, 42 Kan. 485.

A provision of a contract contrary to law cannot be enforced by specific performance. *Clay Center v. Clay Center Light Co.*, 78 Kan. 390.

An answer and cross-petition praying for the specific performance of a contract for the sale of certain land entered into by an agent, which affirmatively shows that the owner had sold it to another bona fide purchaser for a valuable consideration, before the date of the contract made by the agent, and in which no claim is made for dam-

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ages for a breach of such contract, does not state facts sufficient to entitle the defendant to any relief, and is therefore vulnerable to a general demurrer. *Weaver v. Snively*, 73 Neb. 35.

Form of petition in action for the specific performance of a contract for the conveyance of real estate. *McKennon v. Winn*, 1 Okla. 327.

Form of petition in action for the specific performance of a contract to convey land. *Stevens v. Sibbett*, 31 Neb. 612.

Form of petition in action to compel the specific performance of a contract to exchange real estate. *Cooper v. Chittenden*, 33 Kan. 313.

Form of petition in action to compel specific performance of a contract to give to plaintiff the entire estate of the adopting parents of plaintiff. *Kofka v. Rosicky*, 41 Neb. 328, 333.

Allegations in action to compel specific performance of a contract for the sale of certain land. *Perrine v. Mayberry*, 37 Kan. 258.

CHAPTER LIX.

TRESPASS.

- 712. Action against a railroad company for damages for trespass in entering on land to construct railroad.
 - 713. Action against a road overseer for damages for tearing down plaintiff's fence and entering upon his land.
 - 714. Action against a railroad company for trespass, for entering upon land and constructing its roadbed.
 - 715. Supplemental petition in action for trespass alleging damages for acts committed after filing original petition.
 - 716. Action for treble damages alleging the cutting and carrying away of timber on the land of plaintiff.
 - 717. Action for damages for entering premises of plaintiff and carrying away crop of corn standing in field.
 - 718. Action for damages for injuries caused by cutting and mutilating ornamental shade trees growing along the sidewalk.
 - 719. Action for damages for entering upon plaintiff's land and tearing down fences.
- 712. ACTION AGAINST A RAILROAD COMPANY FOR DAMAGES FOR TRESPASS IN ENTERING ON LAND TO CONSTRUCT RAILROAD.**

Plaintiff states that said defendant is now and at the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Kansas; that said plaintiff is now and for more than year last past has been the owner in fee and in the possession of the premises described as follows, to-wit: (here describe); that said land is improved and tillable, and is used and occupied as a single tract for agricultural and stock purposes; that on or about the first of, 19.., and at various times subsequent thereto, and prior to the commencement of this action, the said defendant, with divers irresponsible persons in its employ, unlawfully and with force broke into and entered upon the premises of plaintiff as above described, and then and there broke down the fences then being on said premises, and

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with horses, wagons and scrapers entered upon said premises, and trod down the grass, and cut and destroyed and converted to its own use the corn then and there growing on said premises, all to plaintiff's damages in the sum of dollars, and for which plaintiff asks treble damages; and then and there cut down and destroyed on said premises a grove of ash trees, of the value of dollars, and carried away and converted the same to its own use, for which plaintiff asks treble damages; and then and there made an excavation across said premises feet in width, removing the soil, clay and stones from about acres of land, and converted the same to their own use, to plaintiff's damages in the sum of dollars, for which plaintiff asks treble damages; and then and there constructed across the south half of said premises a fill or grade of dirt and stone about feet in height above the level of the surrounding land, with deep cuts and ditches on either side thereof; that plaintiff's residence and farm buildings have been and are cut off by cuts and ditches and embankments from the greater portion of said premises, and that he has been damaged by the construction thereof in the sum of dollars; that said defendant wrongfully entered upon said premises as aforesaid, without the knowledge or consent of this plaintiff, and without having taken any steps by condemnation or other legal proceedings to appropriate or acquire any rights to any part of said premises.

Wherefore, plaintiff asks judgment against said defendant in the sum of dollars and for costs of this action.¹

¹ Form in Chicago, Kansas & Western R. R. Co. v. Watkins, 43 Kan. 50, 51.

Form of petition in action against an officer for damages for trespass in the execution of a writ, alleging damage to property. Murray v. Mace, 41 Neb. 60.

Form of answer in action against a road overseer for damages for trespass in entering upon plaintiff's land and tearing down fences. Rube v. Sullivan, 23 Neb. 779, 781.

Form of petition for damages for trespass alleging unlawful entry upon plaintiff's land. Gaster v. Weina, 23 Neb. 564.

Form of petition and allegations in action for trespass alleging the

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713. ACTION AGAINST A ROAD OVERSEER FOR DAMAGES FOR TEARING DOWN PLAINTIFF'S FENCE AND ENTERING UPON HIS LAND.

Plaintiff alleges that he is, and was at the time hereinafter mentioned, the owner in fee simple of the following lands and tenements: (here describe) in possession of plaintiff at the time hereinafter named; that the said tract is inclosed and cultivated lands, and that a good wire, board and rail fence was built, with good oak posts at proper distances from each other, enclosing said lands, prior to the day hereinafter named; that on the day of, 19.., the said defendants unlawfully and forcibly broke and entered upon the said lands of plaintiff, tore down the said fence standing upon said land, dug up the plaintiff's ground, trod down his grass, broke the plaintiff's boards, posts, wire, rails and nails, rendering them unfit for use, and also then and there disturbed and have since disturbed the plaintiff in the use and occupation of said land, and have prevented and do prevent him from enjoying the same, as he otherwise would, to the plaintiff's damage, ... dollars.

Wherefore, etc.²

714. ACTION AGAINST A RAILROAD COMPANY FOR TRESPASS, FOR ENTERING UPON LAND AND CONSTRUCTING ITS ROADBED.

Plaintiff states that the defendant during the years 19.., 19.., and 19.., did unlawfully and with force and arms, break, enter, occupy and ever since has occupied a portion of the close of plaintiff heretofore described, and then and there dug, excavated, removed, and piled up the soil and earth of the plaintiff, and then and there built and laid their line of railroad which they have ever since operated, thereby converting to the their own use acres of land out of the corner of the aforesaid described piece or parcel of digging and carrying away of gravel and soil. *Atchison, T. & S. F. R. Co. v. Grant*, 75 Kan. 344.

Allegations in action for damages for trespass where a railroad company entered upon the land of plaintiff to construct a railroad. *Enid & A. R. Co. v. Kephart*, 19 Okla. 1.

² Form in *Rube v. Sullivan*, 23 Neb. 779.

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land (here describe land) whereby the plaintiff for and during all that time lost and was deprived of the use and benefit of said acres of land, all of which is to the damage of the plaintiff in the sum of dollars.³

715. SUPPLEMENTAL PETITION IN ACTION FOR TRESPASS ALLEGING DAMAGES FOR ACTS COMMITTED AFTER FILING ORIGINAL PETITION.

The plaintiff alleges that since the filing of the former petition in the action, to which this is supplemental, the said defendant has wrongfully and unlawfully continued, and still continues, the several acts of trespass charged against it in the former petition on the lands and premises of the plaintiff and described in said petition. Whereby the plaintiff during all of which time lost and was deprived of the beneficial use of said premises, to the damage of plaintiff in the sum of dollars.

Wherefore the said plaintiff prays judgment against the said defendant for the said sum of dollars, in addition to the amount prayed for in the former petition, together with costs of suit.⁴

716. ACTION FOR TREBLE DAMAGES, ALLEGING THE CUTTING AND CARRYING AWAY OF TIMBER ON THE LAND OF PLAINTIFF.

Plaintiff states that he was the owner and in possession of the following described land (describe) on said day of, 19. . ., as well as since and prior to that time; that these defendants by their agents and employees entered upon the above described lands of plaintiff and committed trespass on the same by cutting and carrying away timber therefrom; that the timber so cut and carried away by these defendants was cypress timber and that most suitable for making piling; that the amount of timber cut and carried away by these defendants was trees; and that the reasonable value of the same was dollars; that said defendants went upon the

³ Form in Republican Valley R. R. Co. v. Fink, 18 Neb. 82; same case, 28 Neb. 397.

⁴ Form in Republican Valley R. Co. v. Fink, 28 Neb. 397.

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said lands of the plaintiff without his knowledge or consent. That by said acts of trespass so complained of the plaintiff has been damaged in the sum of dollars, the reasonable price of said timber.

Plaintiff states that at the time said timber was so cut and carried away that the defendant had no interest in or right to the said timber so cut and carried away by him from the said land.

Wherefore plaintiff prays judgment against the defendants for the sum of dollars, treble the amount of damages sustained as in such cases made and provided.

717. ACTION FOR DAMAGES FOR ENTERING PREMISES OF PLAINTIFF AND CARRYING AWAY CROP OF CORN STANDING IN FIELD.

Plaintiff states that she is the owner of the following described real estate, situated in the county of and State of: (describe) and was during and at all times hereinafter mentioned such owner, and in the lawful possession and sole control thereof, and was on and about the day of, 19.., such owner and in lawful and peaceful possession thereof.

That plaintiff is a married woman and said lands came to her during the year 19.. by gift from her father, J. W. C., and by purchase by means furnished by him. That during the year 19.. she resided on said lands and cultivated said farm and there was grown thereon a crop of corn of the value of dollars.

That on or about, 19.., said premises were securely inclosed by good and lawful fences and the entrance closed by gates fastened and locked.

That notwithstanding said inclosures and locks, defendant knowing full well that he had no right on the premises and regardless of the rights of plaintiff, did on said day willfully and maliciously by force and violence break open said inclosure with the intent to do plaintiff injury, and did break and destroy said lock and break open said gate and enter upon said premises, and did repeatedly and continually enter upon said premises from day to day with his servants, employees

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and wagons and teams and did damage to the possession and property of plaintiff and gather, destroy, haul off and dispose of plaintiff's crop of corn then standing in the said field, and dispose of the same as his own and did damage to the freehold and realty of the plaintiff.

Plaintiff says by reason of said wrongful and malicious acts of defendant she is damaged in the sum of dollars actual damages for which she prays judgment, and she further asks that she be allowed exemplary or punitive damages in the sum of dollars and the costs of this action.

718. ACTION FOR DAMAGES FOR INJURIES CAUSED BY CUTTING AND MUTILATING ORNAMENTAL SHADE TREES GROWING ALONG THE SIDEWALK.

Plaintiffs state that the defendant is a corporation, etc., that on, 19.., and prior thereto the plaintiffs owned and were in possession of the following described property (here describe), and that it had been improved by the erection of a good dwelling thereon, reasonably worth the sum of dollars, and had been further improved by setting out shade trees along the pavement in front of said lots, which had grown to be large trees and served to both beautify said property, and to protect the said dwelling house, which fronted west, from the west sun, which added greatly to the comfort and enjoyment of said dwelling; that said trees were located along the pavement, between the center line of the street and the said dwelling aforesaid, and were the property of the plaintiffs.

That on, 19.., the defendant, by its agents, officers and servants, acting within the line of their employment, willfully and wrongfully cut and mutilated the tops and branches of said trees, thereby destroying their beauty and the shade and the comfort they afforded those in the occupancy of said dwelling; that no damages were assessed, nor paid, before said trees were cut, nor at any time, nor were any commissioners appointed for assessing said damages; but defendant cut and mutilated said trees in the presence of E. C., one of the plaintiffs, against her consent and over her objections, and

in a willful, wanton and insulting manner, and in reckless disregard of the rights of plaintiffs.

That by the wrong aforesaid done said property was injured and depreciated in value to the amount of dollars; and that plaintiffs are entitled to exemplary damages in the sum of dollars.

Wherefore, etc.

719. ACTION FOR DAMAGES FOR ENTERING UPON PLAINTIFF'S LAND AND TEARING DOWN FENCES.

Plaintiff states that on the of, 19.., at the county of, in the State of, the defendants, without leave and wrongfully, entered on the following described real estate: (describe) of which the plaintiff was then the owner and in possession thereof, and then and there tore down the fences of plaintiff and scattered his rails, and left his fields open and exposed, by which acts and doings of the defendants the plaintiff was damaged in the sum of dollars, for which he asks judgment.

Statutory provisions. Cob. Ann. Stat. of Neb. 1911, sec. 1648; Gen. Stat. of Kan. 1909, sec. 9692.

A petition which states that the defendant, with his cattle, broke and entered upon plaintiff's premises, and injured and destroyed property thereon, charges a willful trespass and is good against a general demurrer. *Meyers v. Menter*, 63 Neb. 427.

A petition setting up numerous and continued trespasses to personal property states but one cause of action, and is not subject to a motion to divide and number. *Habig v. Parker*, 76 Neb. 102.

A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, although it prays treble damages and does not charge that the trespass was willful, as required by Code of Neb., section 636, as a basis for treble damages. *Lundgren v. Crum*, 47 Neb. 242.

Possession of plaintiff. In order to maintain an action for trespass to land it must appear either that the plaintiff was the owner of the premises or in possession thereof at the time of the commission of the acts charged. *Chicago, Rock Island & Pac. Ry. Co. v. Shepherd*, 39 Neb. 523.

A petition which states that the defendant committed certain injuries to and upon the real estate of the plaintiff, is not insufficient because it does not state that the plaintiff was in the possession of such real estate. *Fitzpatrick v. Gebhart*, 7 Kan. (35) 28.

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The owner of vacant and unoccupied real estate, although not in actual possession, may maintain an action for treble damages, under the statute, against one who, without any authority or right thereto, cuts and carries away timber growing thereon. *Sullivan v. Davis*, 29 Kan. 21.

In an action brought under the provisions of the General Statutes, to recover treble the value of trees and timber cut and taken from land, the possession of the land by the plaintiff is not a prerequisite to his right of recovery. *Arn v. Matthews*, 39 Kan. 272.

One may maintain trespass for injury to his possession, only when he is in the actual possession and so alleges, or where he is the owner of the fee, and further shows by his petition that the land is unoccupied, and the plaintiff has the constructive possession thereof. He may also maintain an action in the nature of trespass on the case where he alleges that he owns the legal title, and further sets out such a state of facts as will show that the injury is an injury to the real estate. *Casey v. Mason*, 8 Okla. 665.

Must be brought in county where lands are situated. *Jacobson v. Lynn*, 54 Neb. 794.

Where, in an action for trespass upon land and injury to growing crops, the petition describes the land on which the trespasses were committed as the property of the plaintiff in Johnson county, the description is sufficient. *Larkin v. Taylor*, 5 Kan. 260.

A petition which alleges that the cattle of the defendant trespassed upon the lands and crops of the plaintiff in the county, and destroyed growing corn belonging to the plaintiff, to plaintiff's damage, will be held good as against any objection that can be raised on demurrer. *Davis v. Wilson*, 11 Kan. 65.

The action of trespass to real estate is a local action. *Brown v. Irwin*, 47 Kan. 50.

An action to recover damage for the trespass and to restrain the further continuance of it may be united in the same petition. *Akin v. Davis*, 11 Kan. 434.

Treble damages are allowed under the statute for injury in value to the things mentioned in the statute by doing the acts thereto which are specified. *Atchison, T. & S. F. Ry. v. Grant*, 75 Kan. 344.

An allegation in an answer in an action to enjoin trespass upon real estate, whereby the defendant seeks to justify a single act of trespass, is not sufficient to show an attempt or purpose to repeat the trespass. *Cox v. Sheen*, 82 Neb. 472.

When allegations in answer of authority of agent are not denied by properly verified denial in reply they may be treated as true. *Moore v. Emmert*, 21 Kan. 17.

Form of answer in an action against a railroad company for damages for trespass in entering upon plaintiff's land, setting up right to enter because of condemnation proceedings. *Republican Valley Ry. Co. v. Fink*, 28 Neb. 397, 400.

CHAPTER LX.

VENDOR'S LIEN.

720. Action to foreclose a vendor's lien.

721. Action on promissory note and for foreclosure of a vendor's lien.

720. ACTION TO FORECLOSE A VENDOR'S LIEN.

Comes now the plaintiff in the above entitled cause and respectfully represents and shows to the court:

1. That the plaintiff is a legal corporation, organized under the laws of the State of N. H.

2. Plaintiff was on and prior to , 19.., the owner in fee of (describe real estate). That on the day of , 19.., the plaintiff entered into a written agreement to and with the defendant, J. R., by the terms of which the plaintiff agreed to sell to the said J. R. and he agreed to purchase from the plaintiff the premises above described for the price and consideration of \$., to be paid to the plaintiff as follows: (set out manner in which payments were to be made) and the said R. further agreed to keep in force insurance on the house on said premises in amount not less than \$., and it was further provided in said agreement that if said sum of money should not be paid or any part thereof or any interest thereon should not be paid when due the whole of said sum and interest should by said agreement immediately become due and payable, and further provided if the taxes and assessments levied against said premises should not be paid when due and payable the whole of said sum should in like manner immediately become due and payable, and it was further agreed that upon the payment of said purchase money and interest thereon the plaintiff would execute and deliver to the said J. R. a good and sufficient warranty deed conveying said real estate to him in fee simple, free of all encum-

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brances except taxes for the year 19. . and subsequent taxes. That in case the said J. R. should refuse and neglect or fail to pay said purchase money and interest as thereon above stated he should forfeit any and all rights in and to said real estate acquired under and by virtue of the said agreement and forfeit any money paid for the purchase of the same unless said party of the first part should otherwise elect, and it was further provided in said agreement that the said J. R. should be entitled to possession of said real estate so long as the conditions of said agreement should remain unbroken by him, but was further provided that upon the failure on his part to comply with said agreement his right of possession should terminate and the plaintiff should thereupon be entitled to possession of said premises and improvements thereon, and it was further provided that no assignment of this contract should be valid without the consent of the plaintiff endorsed thereon, and further provided that the parties thereto thereby bound their heirs for the faithful performance of all the terms of said agreement, which agreement was signed by the plaintiff and the said J. R., all of which will appear by reference to the same, a copy of which is hereto attached and made a part hereof.

3. Plaintiff further represents that the defendant H. L. Y. is in possession of said premises, collecting the rents and income thereof and has been for some years last past, claiming as plaintiff is informed and verily believes, right to possession of the same as assignee of the said J. R. That no assignment of the said agreement from the said J. R. to the said H. L. Y. was ever given by or with the consent of the plaintiff in writing or otherwise. The plaintiff further represents that the monthly payments as provided for in said contract were made to the plaintiff up to and including the payment of, 19. ., but that the monthly payment due on the day of, 19. ., together with all the monthly payments on said agreement which have accrued since that date, have remained due and payable and no part thereof has been paid by the defendants or either of them. That the defendants have also failed and neglected to pay the insurance

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premiums on the said premises and the plaintiff for the protection of its security has been compelled to pay the same, and on , 19.., paid for the insurance on the house on said premises \$...... and on , 19.., paid for the insurance \$...... and on , 19.., paid for insurance \$...... That the defendants have also failed and neglected to pay the taxes on said premises and permitted the same to be sold for taxes and the plaintiff for the protection of its security in said premises has been compelled to redeem said premises from tax sale and on , 19.., paid on account of redemption of said premises from tax sales to the treasurer of D. county, Nebraska, the sum of \$......, no part of which has been paid by the defendants or either of them. That there is now due the plaintiff on said contract the principal sum of \$...... and interest thereon from , 19.., at the rate of per cent. per annum, payable monthly in accordance with the terms of said agreement, together with the sum of (set out amount paid for insurance, etc.), no part of which has been paid, and no proceeding at law has been commenced for the payment of said indebtedness or any part thereof. That the plaintiff has elected to foreclose said agreement and to take possession of said premises in accordance with the terms and provisions thereof. That under the terms and provisions of said agreement, the defendants having made default, plaintiff is entitled to immediate possession of said premises and an appointment of receiver by this court to take possession of said premises and collect the rents and income thereof during the pendency of this suit and until the final termination thereof to apply the same by and under the direction of this court.

4. The plaintiff further represents that the defendant H. L. Y. claims some right in said premises as assignee of the defendant J. R. and is in possession of the same, and the defendant J. Y. claims some rights in said premises as husband of the said H. L. Y., and the defendant Mrs. J. R., whose first real name is unknown to the plaintiff, claims some rights in the premises as wife of said J. R., and the defendant, ..., is tenant in possession of said premises and claims some rights

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there as such, but that the rights of each and all of the defendants are second and subject to the rights of the plaintiff under said agreement hereinbefore described.

The plaintiff therefore prays that the several defendants be required to answer this petition and upon the hearing the court will take an account of the amount of the principal and interest due the plaintiff on said agreement and also of the amount of insurance and taxes paid by the plaintiff and interest thereon, and that unless the defendants pay the amount which may be so found due by the court the said premises hereinbefore described may be sold by and under the direction of the court and the proceeds therefrom applied to the payment of the amounts which may be found due the plaintiff, together with the costs of this suit, and that upon sale thereof and failure to redeem prior to the confirmation thereof the defendants and all persons claiming by, through or under them may be barred and foreclosed of all right and equity of redemption in or to said premises or any part thereof; that the court will appoint a receiver to take possession of said premises during the pendency of this suit and until the final termination thereof, and collect the rents and income thereof and apply the same by and under the direction of this court and that the plaintiff have such other and further relief in the premises as equity requires and to the court may seem just.¹

721. ACTION ON PROMISSORY NOTE AND FOR FORECLOSURE
OF A VENDOR'S LIEN.

1. H. S., plaintiff, complains of the said J. D. R., defendant, and says that on the day of, 19.., the said J. D. R., for a valuable consideration, executed and delivered to plaintiff his certain principal promissory note of that date, whereby, for value received, he promised to pay to the order of said H. S., plaintiff, ... months after date thereof, the sum of \$....., with interest of per cent. per annum, and per cent. attorney's fee, if placed in the hands of

¹ From form in record in Portsmouth Savings Bank v. Yeiser, 81 Neb. 343.

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an attorney for collection. Said note matured by reason of the non-payment of principal and interest as hereinafter set out, and is now due and wholly unpaid. A vendor's lien is retained in deed, to secure the payment of said note, a copy of which is hereto attached, and made a part hereof and marked "Ex. D."

That plaintiff is now the legal holder and owner of said note, a copy of which is herewith filed, attached hereto as a part hereof and marked "Ex. A."

(Set out additional causes of action for other notes.)

2. Plaintiff further states that on the day of, 19.., she made, executed and delivered a deed to lots and, in block, in the M. addition to the city of O. C., together with all improvements, rights and hereditaments thereto belonging or appertaining to the same, for the consideration of dollars, paid and to be paid as follows: dollars cash in hand paid by defendant, J. D. R., and the further sum of \$...... to be paid by said J. D. R. as follows: (set out payments); all of said amounts are evidenced by the notes herein sued on and hereto attached, and a vendor's lien is specifically retained in said deed to secure the payment of all the above named notes and also per cent. amount of said notes as attorney's fee, in case said notes were collected by law.

It is further provided in said deed, that in default of payment of any of said notes or any interest on the same, when due, all of said notes shall become due and payable at the option of the legal holder thereof. A copy of said deed is hereto attached and made a part of this petition and marked "exhibit D."

That said deed was filed for record in the office of register of deeds in and for said county of O., State aforesaid, on the day of, 19.., and duly recorded in volume, page

That said defendant J. D. R. has failed and neglected to pay the first note of \$......, that he has also failed to pay any of the semi-annual installments of interest on said principal notes, when the same respectively became due; by the

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terms of said notes and deed all said notes became due and payable, none of which defendant has paid but has made default of said payments, which default has continued till this date, by reason of this the whole of the debt secured by said vendor's lien has become due and payable and said plaintiff has declared and does declare the same now due and payable.

That there is now due to said plaintiff on said indebtedness, notes and vendor's lien the said sum of \$. with interest thereon, at the rate of per cent. per annum from the day of, 19.., on all of said notes, and the further sum of dollars attorney's fee as agreed upon in said notes, which said sum of money and interest said plaintiff claims.

That by reason of the default as aforesaid, made in the payment of said indebtedness the conditions of said deed and notes have been broken, and all of said debts, interest and attorney's fees are now due and payable.

And for a further cause of action, the plaintiff herein alleges that the notes herein sued on are given for the purchase money of lots and in block in M. addition to the city of O. C., in said county and state. That in the deed aforesaid, and which is hereto attached, there is a vendor's lien specially retained in said deed to secure the payment of said notes. That the conditions of said deed retaining said vendor's lien has not been performed and that the property is probably insufficient to discharge the said purchase money debit.

Wherefore plaintiff prays judgment against the defendant J. D. R., for said sum of dollars, with interest thereon at the rate of per cent. per annum, payable semi-annually from the day of, 19.., and per cent. attorney's fees. That said vendor's lien may be foreclosed; that the lien, claim, interest, estate and equity of redemption of said defendant J. D. R., if any he has, in and to said premises may be determined and settled and that said plaintiff may be adjudged to have the first lien and claim on said premises; that said premises on which said

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vendor's lien exists may be ordered to be sold according to law with appraisement and the proceeds arising from said sale be applied to the payment of said indebtedness due said plaintiff; that said defendant be forever debarred and foreclosed of and from all right, title, estate and interest in said property and equity of redemption and in and to said premises or any part thereof; and that said plaintiff may have such other and further relief as shall be agreeable to equity and good conscience.²

² From form in record in *Sherman v. Randolph*, 13 Okla. 224.

CHAPTER LXI.

WARRANTY.

- 722. Action for damages for breach of warranty as to quality of a carload of potatoes.
- 723. Action for damages resulting from feeding oats containing castor beans, which were purchased from defendants.
- 724. Action for damages for breach of a warranty in the purchase of a horse.
- 725. Allegations in action for breach of warranty in a contract for sale of a stallion.
- 726. Action for breach of a contract of warranty in the sale of a piano.
- 727. Action for damages for breach of warranty of soundness of horse purchased.
- 728. Action for breach of warranty in sale of quantity of apples.

722. ACTION FOR DAMAGES FOR BREACH OF WARRANTY AS TO QUALITY OF A CARLOAD OF POTATOES.

Comes now the S. G. and P. Co., and for its cause of action against the defendant says: That the plaintiff, the S. G. and P. Co. is a partnership composed of C. S. S., L. H. and E. C. P., doing business under the firm name and style of the S. G. and P. Co., in the city of A. C. in the State of Kansas, and was at all the times hereinafter mentioned doing a grain and produce business in said city. That the defendant, The Z. J. F. P. Co., is a partnership composed of Z. J. F., and other persons whose names are to plaintiffs unknown, doing business in the city of D. in the State of Colorado, and was at all the times hereinafter mentioned doing a business of buying and selling produce, vegetables and fruits in said city of D. That on the day of, 19.., the plaintiff sent from A. C. in the State of Kansas, a telegram to the defendant in the city of D. in the State of Colorado, which telegram was in words and figures as follows: (set out telegram).

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That said telegram was received by the defendant in the city of D. and on the day of, 19..., the defendant sent from D. in the State of Colorado, to the plaintiff at A. C. in the State of Kansas, a reply to said telegram above given, which telegram so sent to plaintiff by defendant on said last named date is in words and figures as follows: (set out telegram).

That said telegram was received by plaintiff in reply to the first telegram above given, and was so received by plaintiff on the day of, 19..., at A. C., and plaintiff sent to defendant the following telegram from A. C. to the defendant in the city of D., accepting defendants' offer, as to a car load of potatoes (set out telegram).

That the word "spuds" in said telegram meant "potatoes" which fact was known to defendant as evidenced by a letter written by defendant to the plaintiff on the day of, 19..., which letter is in words and figures as follows: (set out letter).

That the invoice accompanying said letter and enclosed therein was in words and figures as follows: (set out invoice).

That said car of potatoes arrived in A. C., Kansas, about the day of, 19..., and that the bill of lading therefore was attached to a draft drawn by defendant upon plaintiff, which was sent by defendant to the H. N. Bank of A. C., Kansas, and which draft amounted to the sum of \$.....

That the said draft so drawn by defendants upon plaintiff and the bill of lading attached thereto, was sent by defendants to the H. N. B. of A. C., Kansas; to be presented to plaintiffs for payment. That a copy of said draft so drawn and sent by defendant to the H. N. B. is as follows: (set out draft).

And when said draft was paid by plaintiff to said bank, said bank wrote across the face of said draft, "Paid , 19... H. N. B., A. C., Kansas."

The plaintiffs were unable to obtain possession of said potatoes until they paid said draft and took up said bill of lading; that the only examination the plaintiffs were per-

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mitted to make of said potatoes, was such examination as they could make of said potatoes while they were in the car, and the car was in the possession of the St. L. and S. F. R. Co. That before paying said draft these plaintiffs went to the said car and found that said potatoes were in sacks; that the said sacks were laid in said car in tiers or rows, piled one upon the other. That the plaintiffs could inspect and examine only such of said potatoes as were on top, and could not inspect or examine those that were underneath without removing said potatoes from said car and this they were not permitted to do.

That from such an inspection and examination of said potatoes as the plaintiffs were enabled to make of said potatoes while in the car, and before removing them therefrom, they considered them of about as good quality as they had purchased, and relying upon all of the potatoes in said car being of the same quality as those on top, and those which plaintiffs could inspect and examine in the car, they paid said draft amounting to \$., and took said bill of lading, and unloaded said potatoes from said car.

That in unloading said potatoes and on removing them from said car, the plaintiffs discovered that more than half of said potatoes were rotten, knotty, grubby, and worthless; that in the bottom of some of the sacks, were found tops of potatoes instead of potatoes; and the plaintiffs charge the defendants with having fraudulently and with the purpose of deceiving and cheating and defrauding them, purposely loaded said car in such a manner as to prevent these plaintiffs from learning or ascertaining the true character and quality of said potatoes, upon such an inspection and examination as plaintiffs were enabled to make of said potatoes while they were in said car and before removing them therefrom, for the purpose of securing the payment of said draft before plaintiffs could ascertain the character and quality of potatoes that were in said car.

That in the loading of said car, the defendant, his agents, servants and employees whose names are to plaintiffs unknown, did place in the bottom of said car and below the

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upper tier of sacks in said car, sacks containing rotten, grubby and knotty potatoes, wholly worthless and of no value, for the purpose of cheating, defrauding and deceiving plaintiff.

That plaintiff paid defendant a fair reasonable price for good potatoes, but that by and through the wrongful acts of the defendant as aforesaid, his agents, servants and employees whose names are to plaintiffs unknown, these plaintiffs were damaged in the premises, in the sum of \$.....

That all the telegrams and letters relating to said purchase are above set out, and that all the contract between the plaintiffs and defendants relating to said purchase, consisted of letter and telegrams copies of which are set out herein. That all the correspondence relating to the said potatoes upon the part of these plaintiffs was conducted by C. S. S., and that these plaintiffs do not know who conducted the same upon the part of the defendant.

That the plaintiffs have not in their possession the original bill of lading attached to said draft, and are unable to attach a copy or the original thereof to this amended petition.

That there is due and owing to plaintiffs from defendants, by reason of the facts hereinbefore set out the sum of \$....., with interest at the rate of per cent. per annum from the day of, 19.., no part of which has been paid.

Wherefore plaintiffs pray judgment against the defendants for the sum of \$....., with interest at the rate of per cent. per annum from the day of, 19.., and costs of suit.¹

723. ACTION FOR DAMAGES RESULTING FROM FEEDING OATS CONTAINING CASTOR BEANS, WHICH WERE PURCHASED FROM DEFENDANTS.

Comes now the plaintiff, J. B., in the above entitled cause, and, for his amended complaint in this cause against the defendants, W. H. C. and H. S. S., filed by leave of the court first had, says:

¹ From form in record in Z. J. Fort Pro. Co. v. S. W. Grain Co., 26 Okla. 13.

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That the defendants are, and have been for more than one year last past before the filing of this action of, 19.., partners doing business at, Oklahoma, under the firm name of C. & S. That the defendants have been during said time and were on the day of, 19.., in the retail grocery and feed business, and engaged in the furnishing of groceries and provisions for domestic consumption, and in the sale and furnishing of hay, oats, corn, chop and other provisions for the feed of horses, cattle and other animals.

The plaintiff further alleges that ever since the day of, 19.., he has been and on the day of, 19.., he was engaged in the livery business in the city of, ... county, Oklahoma, and in the business of letting horses, teams and buggies for hire, and for boarding and keeping horses of any person who might apply, for pay.

The defendants, C. & S., at all times herein alleged, well knew that the plaintiff was engaged in said business; that the plaintiff had at divers and sundry times, and frequently during all times, purchased of the said defendants feed, hay, corn, and oats, for the feed of his horses, and his boarding horses, in his said business; that on the day of, 19.., the plaintiff purchased of said defendants bushels of oats, at the agreed price of cents per bushel, for which the plaintiff made payment to the said defendants, and the said defendants agreed to furnish for said money so paid by said plaintiff the said bushels of oats, the said defendants at the time well knowing that the same was for the feed of plaintiff's horses and other horses in his said livery business, and the defendants were bound to furnish to the plaintiff good and wholesome oats for his said feed.

Plaintiff further alleges that the said defendants, instead of furnishing to the plaintiff the said bushels of good and wholesome oats, furnished to the plaintiff bushels of oats in which castor beans had been spilled in and among the said oats, through and by the carelessness

and neglect of the said defendants and their employees in the handling of said oats and castor beans in their place of business; that the said defendants and their employees, at the time they were sold and delivered to said plaintiff, well knew that the said oats and the said castor beans had been so placed together and intermingled, in their said business that the said castor beans were liable to be in and were in the said oats, and that they sold said oats to the plaintiff as aforesaid, without apprising the plaintiff of the fact that said castor beans had been so handled in said business as that the said beans were in and would be in said oats.

The plaintiff further alleges that he had no knowledge whatever at the time of the furnishing of the said oats by the said defendants to the plaintiff, that the said beans were in the said oats, and that he relied upon the said defendants, as he had often done, and as the defendants well knew he was doing, to furnish to the said plaintiff the said oats in a good and wholesome condition and suitable feed to his said horses and other horses in his said business.

The plaintiff further alleges that the castor beans in said oats were a deleterious and poisonous vegetable substance, and were so scattered through the said oats that the same were not discovered by the plaintiff at the time of the purchase of the same, and could not be discovered without the knowledge that the same were in said oats, and without making an unusual examination of the same.

The plaintiff further alleges that in the due course of his said business he, without knowing that said castor beans were in said oats, fed said oats to his and other horses, in the course of his business, and that thereby his boarding horses were seriously poisoned; and one of his boarding horses died from said poison, and three of plaintiff's horses died from said poison.

That by reason of negligence of said defendants and their servants and employees as aforesaid, and by reason of the said castor beans in said oats as aforesaid, and the facts therein stated as aforesaid, the plaintiff has been, by the said de-

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fendants, greatly damaged in the sum of dollars, as follows, to-wit: (here set out account).

The plaintiff further alleges that he was not guilty of any contributory negligence in said cause or matter, and that he did everything in his power to care for, doctor and treat said animals and prevent damage thereto.

The plaintiff further alleges that he has demanded of the said defendants payment of the said sum of money, as aforesaid, due the plaintiff, and which payment the said defendants refuse to make.

Wherefore, the plaintiff prays judgment against the said defendants in the sum of dollars, with legal rate of interest from the date of the filing of their original complaint and cost of this action, and all other proper relief.²

724. ACTION FOR DAMAGES FOR BREACH OF A WARRANTY IN THE PURCHASE OF A HORSE.

1. The plaintiff complains of the defendant for that on the day of, 19.., the defendant, as an inducement to plaintiff to purchase from him, said defendant, a certain imported black stallion called K. of the S., for the sum of dollars, said defendant warranted the said horse to be a foal-getter and sound in every respect, except an enlargement of said horse's bag, which was caused by a kick, and represented the said horse as being then and there sound; that the title to the same was clear, and that said horse was registered in the stud book of England, as well as his dam and sire, and would furnish the secretary's receipt for such pedigree; and plaintiff, relying on said warranty and statements, purchased said horse from the defendant for the sum of dollars then duly paid.

2. Plaintiff avers that said horse, at the time of said sale, was unsound in this, that the enlargement of said horse's bag was hernia at the time of said sale, and in no way was he free from difficulty or trouble, and was of no value whatever; that one testicle of said horse was mashed and completely ruined, and was of no benefit to the said horse, and

² Form in Coyle and Smith v. Baum, 3 Okla. 695.

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on account of said hernia, mashed testicle, and urethral gleet, all of which the said horse had at the time of the purchase, combined, caused the death of said horse, to-wit, on the day of, 19...

3. Plaintiff avers that the pedigree of said horse was not as warranted by the defendant, and that the said defendant never has furnished the secretary's receipt for such pedigree as agreed to have been done on the part of the defendant.

4. Plaintiff avers that said horse was not a good foal-getter, and by reason of the above premises plaintiff has sustained damages in the sum of dollars.³

725. ALLEGATIONS IN ACTION FOR BREACH OF WARRANTY IN A CONTRACT FOR SALE OF A STALLION.

Plaintiff states that during the month of, 19..., the said plaintiffs bought of the said defendant, for the price of dollars then paid by the plaintiffs to the defendant, one certain dapple-gray stallion named "J. B."; that the said stallion was purchased for the express and only purpose of keeping and standing him as a stallion, covering mares and getting colts; that at the time of the said purchase the said defendant was informed and knew that the said plaintiffs were purchasing said stallion for the purpose above named, and the same was sold by the said defendant to these plaintiffs for the said purposes; that the said defendant at the time of the said sale, and as a part of the terms and consideration of said contract of sale, then and there represented, promised and warranted to these plaintiffs that the said stallion was a sound, healthy horse, perfect in all his parts, and that he was a good breeder and a sure foal-getter; that at the time of the said sale the said plaintiffs, relying upon and confiding in the said representations, promise and warranty of the said defendant, purchased the said stallion, and paid therefor the sum of dollars to the said defendant; that at the time of the said sale, representations, promise, and warranty, the said stallion was

³ Form in *Watson v. Roode*, 43 Neb. 348.

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utterly worthless, and unfit for the purposes for which he was purchased as aforesaid, and that he then was barren and impotent, useless and valueless as a breeder and foal-getter; that by reason of the premises, the plaintiffs were misled and injured, and have sustained damages to the amount of dollars.⁴

726. ACTION FOR BREACH OF A CONTRACT OF WARRANTY IN THE SALE OF A PIANO.

The plaintiff claims of and from the defendants the sum of dollars, and for cause thereof alleges that some time during the month of, 19.., he purchased of and from the defendants a piano for the sum of dollars, and plaintiff avers that, as an inducement for him to make said purchase, one, agent of defendants, represented to him that the piano in question was worth dollars, and that he had never sold one for less than dollars, and they could not be purchased for less than said amount, and that he had sold one exactly like it to B. G. F. for dollars; that this piano should be as good in every respect; that the piano so bought was a F. piano known as the "baby grand"; that the said agent represented to plaintiff that said piano was of a superior make and a much better grade of piano than the H. or other pianos; he also represented to the plaintiff that he could take said piano, and if it did not prove entirely satisfactory to plaintiff after trial, they would take it back and furnish him with another instrument worth the money; that plaintiff was not a judge of pianos and so informed the defendant, and that he would rely on them furnishing him an instrument that was all right and worth the money. The said defendants further represented to plaintiff that they would warrant said instrument for five years; that it should be all right in every particular.

Plaintiff avers the fact to be that said instrument was not as represented, in this, that it was not worth more than dollars; that the said defendants have been selling

⁴ Form in Culp v. Steere, 47 Kan. 748.

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said instruments for dollars; that it is not worth more than half as much as the one he sold C. B. F.; that the said piano is of an inferior grade and not near as good a piano as the H. and others of the same kind; that the piano was not satisfactory to plaintiff, and he so informed defendants numerous times and asked them to take it back and furnish him with another instrument worth the amount of money paid by plaintiff; that the plaintiff bought the piano for his daughter upon the express representation that it was of a superior make, and the same has been out of repair for the full year since he bought it; that he has notified the defendants several times that it was out of repair and they have sent an agent several times to fix it, but each time when it was repaired it would not remain in repair more than a few days, and that the same is not worth more than dollars; wherefore plaintiff, on account of the matter and things hereinbefore, has been damaged in the sum of dollars, no part of which has been paid, with costs of suit.⁵

727. ACTION FOR DAMAGES FOR BREACH OF WARRANTY OF SOUNDNESS OF HORSE PURCHASED.

Plaintiff states that on the day of, 19.., the defendant sold him a horse for dollars; that by said contract of sale the defendant warranted said horse to be sound in every particular; that plaintiff relied upon said warranty and was thereby induced to purchase said horse and to pay defendant the said sum of dollars.

Plaintiff states that said representations as to soundness of said horse were false and that at the time of said sale said horse was unsound in this, that he was afflicted with a disease known as curb, which is an incurable disease, and that said horse was also afflicted with a disease known as thrush, and that said horse is by reason of said diseased condition valueless and was so at the time he was delivered to the plaintiff.

Plaintiff states that he has tendered said horse to defendant and requested the return of his money and said defendant

⁵ Form in *Lyon v. Moore*, 35 Neb. 636.

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wholly refuses to accept said horse or return to plaintiff the said purchase price of said horse; that in caring for said horse he is daily expending, and has expended the sum of dollars in caring for and maintaining said horse.

Plaintiff states that by reason of the representations and warranty as to soundness he has been misled and injured thereby and has sustained damages by reason thereof in the sum of dollars.

Wherefore, etc.

728. ACTION FOR BREACH OF WARRANTY IN SALE OF QUANTITY OF APPLES.

Plaintiff states that on the day of, 19.., it bought of the defendants at, ..., ... barrels of No. 1 apples; that at the time of said sale said apples were warranted by the defendants to be No. 1 apples, No. 1 apples being a particular grade or quality of apples well known to the market and to persons buying, selling and dealing in apples in the market in, ...; and plaintiff avers that it paid to the defendants therefor the sum of dollars; that by the terms of said sale and agreement said defendants were to superintend the shipping of said apples to plaintiff at its place of business in the State of as called for, and that apples were subsequently shipped to plaintiff in the State of in the pretended compliance on the part of said defendants with the terms of their said contract; that said apples so shipped to plaintiff and received by it were not of the kind and quality bought by plaintiff of said defendants, but were greatly inferior in quality and value to those which plaintiff had bought in this; that barrels of the apples so shipped to plaintiff and received by it were not of the grade or quality of apples known as No. 1 apples, but plaintiff avers that the apples contained in said barrels were very small and knotty and greatly inferior in quality and value to No. 1 apples and worth much less in the market. Plaintiff avers that the apples contained in said barrels were practically worthless and of but little value; that by reason of the

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premises plaintiff has been damaged in the sum of dollars.

Wherefore, etc.

Form of petition in action on a warranty of a harvesting machine.
Fuller & Johnson v. Schroeder, 20 Neb. 631.

Where an action is brought on a contract of warranty, and the petition is silent as to whether the contract is in writing, there is no presumption that it exists in parol, and the written warranty is admissible in evidence at the trial. **Watson v. Roode, 30 Neb. 264.**

CHAPTER LXII.

WILLS.

- 729. Action to set aside a will alleging undue influence and fraud in the making.
- 730. Action to set aside a will alleged to have been forged.
- 731. Action to obtain the probate of a will alleged to have been lost, spoliated or destroyed.
- 732. Allegations of undue influence.
- 733. Action to set aside will alleging (1) testamentary incapacity, and (2) undue influence.

729. ACTION TO SET ASIDE A WILL ALLEGING UNDUE INFLUENCE AND FRAUD IN THE MAKING.

Comes now the plaintiff, and states: That heretofore, to-wit, on the day of, 19.., one L. G., a resident of S. county, Kansas, departed this life in said county and state seized and possessed of an estate real, personal and mixed, lying and situate in said county and state as follows, to-wit: lands and personal property amounting to \$..... That said decedent, L. G., died leaving surviving him a widow, C. G., and J. G. plaintiff, G. G., H. H., J. E. R. and E. Z., his children, defendants. F. G. produced and filed in the probate court of S. county, Kansas, an instrument purporting to be the last will and testament of L. G., deceased; a copy of which is hereto attached, marked "exhibit A" and made a part hereof, and the same was subsequently, to-wit: on the day of, 19.., admitted to probate by said court, and said probate court thereafter on the day of, 19.., appointed said defendant as executor of the said estate of L. G., deceased, and that said F. G. is now the duly appointed, qualified and acting executor of the estate of said L. G., deceased, and of said pretended will.

That said instrument is not the valid will and testament

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of said decedent. That at the time of executing the same said L. G. was under the restraint and undue influence of said defendant, F. G.

That said L. G., deceased, was a farmer during his lifetime and that he and said defendant, F. G., lived on a farm in S. county in the same house and kept house in common. That said L. G. was an old man aged about 70 years, and was very hard of hearing and dull of comprehension. That for several years immediately prior to his death said L. G. on account of his advanced age depended for advice, counsel and guidance in all business matters and matters concerning his property, upon said F. G., his son, who lived with him. That said L. G. confided in said son, F. G., and relied upon him to advise him with reference to all business transactions.

And this plaintiff says that while said defendant, F. G., was exercising the influence over said L. G. as aforesaid, he, the said F. G., in order to prejudice his father's mind against this plaintiff and to advance his own personal interests, began a systematic effort to induce said L. G. to make a will giving to said F. G. the larger part of his estate, and to deprive this plaintiff of a just and proper share of the same. That in order to induce said L. G. to make such a will he at various times told said L. G. that this plaintiff was a drunkard and was using intoxicating liquors to excess. That he told said L. G. at various times that this plaintiff said that 20 cents of each dollar which said L. G. had accumulated belonged to him (J. H. G.). Plaintiff states that both of said statements were repeatedly made by F. G. to his father, L. G., and that said F. G. did all in his power by the malicious use of said false statements to prejudice his father's mind against said plaintiff. That said statements and each of them were absolutely and wholly false and maliciously made to his father by said F. G. for the sole purpose of prejudicing his father against said plaintiff as aforesaid, and inducing his father to deprive plaintiff of an equal share of said estate with the other children.

Plaintiff states that he endeavored to explain to his father

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that said statements were false and untrue, but that on account of the sway which said F. G. had over said L. G., and the fact that his father was so very deaf and dull of apprehension he could not succeed in making a satisfactory explanation to his father and convincing him of the falsity of said statements so maliciously told him by the defendant, F. G.

Plaintiff alleges that said false statements were made by said F. G. for the purpose of inflaming the mind of said L. G., deceased, against this plaintiff and induce him to make the aforesaid will and that on account of said false and malicious stories told his father concerning plaintiff his father became greatly incensed and displeased with plaintiff, and as a result thereof executed said will in which he gave plaintiff a less amount of his property than he gave to the other children, wholly on account of said malicious and false statements concerning said plaintiff, made by F. G., as aforesaid.

Plaintiff alleges further that on the day of, ..., at the time when the instrument purporting to be the will of L. G. was executed, the said L. G. was of weak and enfeebled mind on account of his age and dullness of hearing, and was under the complete undue influence, restraint and domination of the said defendant, F. G., and that by reason of the premises the said instrument is invalid and void.

Wherefore said plaintiff prays that the said pretended will and the probate thereof may be set aside and held for naught. That the letters of administration issued to said F. G. be set aside and annulled, and that the plaintiff be in all things restored to his rights as an heir at law of the said decedent, L. G., and that he have judgment for the costs of this suit, and for such other and further relief as in the premises may be proper.¹

730. ACTION TO SET ASIDE A WILL ALLEGED TO HAVE BEEN FORGED.

The plaintiff, E. Y. (formerly E. McD.), complains of the

¹ From form in record in *Ginter v. Ginter*, 79 Kan. 721.

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defendants above named, for that, on or about the day of, 19.., one W. McD. departed this life at F. S., in the I. T., seized and possessed of the tract of land in said county of C., to-wit: (here describe property) and being also the owner and in the possession of the following personal effects, to-wit: (here set out) that said decedent, W. McD., died unmarried, and without issue, and his father having died before the death of said W., he left the plaintiff as his sole heir-at-law, she being his mother; that said W. McD. died without having made any disposition of said estate, or any part thereof, by will or otherwise; that on or about the of, 19.., the defendant D. J. F., fraudulently intending to cheat and defraud the plaintiff in the premises, falsely and fraudulently wrote and forged a paper in the words and figures following, and purporting to be the last will and testament of said W. McD., to-wit: (set out will).

And plaintiff further shows and alleges that said defendant D. J. F., then the probate judge of C. county, indorsed upon said pretended will the certificate, a copy of which is last above written, and signed the same with his designation of office of probate judge of said C. county and deposited the same in his said office, well knowing that the same was false, fraudulent, and forged as aforesaid; that on the day of, 19.., the said F. appeared before C. W. McD., the then probate judge of said county of C., and falsely testified that said W. McD. made a will; and on the day of, 19.., the said defendant F., further intending to cheat and defraud the plaintiff in the premises, falsely made affidavit, and caused his wife, S. A. F., falsely to make affidavit, before A. A. C., the then probate judge of said county, that they each saw said McD. sign the aforesaid pretended will, and that they each subscribe their names thereto, as witnesses, in the presence of the said W. McD., and at his request, they each well knowing that said W. McD. did not sign said pretended will, and well knowing said pretended will to be false and forged as aforesaid; that on the day of, 19.., the said defendant, D. J. F.,

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further intending to cheat and defraud the plaintiff in the premises, caused himself to be appointed administrator of said W. McD., deceased, with the will annexed, thereby intending to dispose of said estate according to the terms of said forged will, and to cause the same to pass from the plaintiff to the defendant A. E. S., she being privy thereto, and fraudulently intending thereby to receive and obtain the title, ownership and possession of said estate as such false and pretended devisee under said pretended will.

Wherefore the plaintiff says she has been injured and has sustained damages in the sum of dollars; and she prays judgment, that said pretended will be adjudged false, fraudulent, and forged, and that the same may be set aside and held for naught; that the letters of administration with-the-will-annexed, so as aforesaid, be revoked and annulled, and that said D. J. F. be removed from his said supposed office of administrator with-the-will-annexed, that the plaintiff be in all things restored and reinstated in her rights in the premises, as sole heir-at-law to the estate of her said deceased son, the same as if said pretended will had not been admitted to probate, and said letters of administration had not been granted; that the plaintiff have and recover dollars for her damages sustained by reason of the premises, and that she may have such other and further relief in the premises as equity and good conscience may require, and as to the court shall seem meet, and that she recover the costs of this action.²

731. ACTION TO OBTAIN THE PROBATE OF A WILL ALLEGED TO HAVE BEEN LOST, SPOLIATED OR DESTROYED.

Plaintiffs allege by their next friend that the former is years old and the latter, and both are residents of C. county, and that they have requested the said next friend to institute proceedings as their next friend in their behalf. That said next friend further represents to the court that said plaintiffs are the minor children of G. S., now deceased. That heretofore, to-wit, in the month of

² Held sufficient in *Fowler v. Young*, 19 Kan. 150.

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....., 19.., the said G. S. was a resident of said county of C., where he was the owner of real estate as follows: (here describe); in fee simple absolute along with other property of value. That afterwards, to-wit, in the same month and year the said G. S., being then the owner of said property as aforesaid and being then and there of full age and sound mind and memory and desirous of making a will, he then and there employed one P. A. L. to draw up for him under his direction such will and the said P. A. L. thereafter, to-wit, in the month and year aforesaid by the request and under the direction of the said G. S. did reduce such will to writing after which it was read over throughout to said S. by said L. and was by S. personally scrutinized and the said S. then and there signed his name to such will at the end thereof, as aforesaid and declared the same to be his last will in the presence of the said plaintiff, and the said P. A. L. and F. R., who saw him sign his name thereto, and who saw said L. write said will, and who heard said S. dictate the contents thereof, and the said L. and R. then and there signed each for himself and not for the other their names thereto as witnesses of the facts in relation to the making and signing of said will as aforesaid.

That by the terms of said will the said G. S. bequeathed to the daughter of plaintiff by a former marriage the sum of \$. to \$., the exact amount to be fixed by her said mother, his wife as aforesaid, and to the daughter of M. J. R. the sum of dollar, and the residue of his property both personal and real after the payment of his funeral expenses and just debts, by the terms thereof was to go to the said W. G. S. and L. G., his minor children, share and share alike, and no other bequests were made therein.

That the said S. after the execution of the aforesaid will left the same in the house where he resided in the said county of C., and afterwards, to-wit, on the day of, 19.., sickened and died without revoking said will, or any part thereof, and while the same was in existence and in full force and effect. That at the time of his said death he was the owner of the real estate aforesaid, along with other

property but just how much your petitioner is not now advised, that he left his sole recognized and surviving heirs at law, his said wife, and her minor children, for whom this suit was brought.

That his said wife has since his said death intermarried with the said F. R.; that on the day of, 19 . . ., the said wife had said will in her possession, since which time it has disappeared and its whereabouts cannot be ascertained. That the said daughter of the said M. J. R. now goes by the name of M. A. S. and claims one-sixth interest in said real estate, alleging that the same M. J. R. and the said G. S. were married, and that she is his daughter.

Your petitioner further avers, however, that if she is the daughter of the said M. J. R., that she was not born while relationship of husband and wife existed between her said mother and said G. S.

That no provision was made in said will by the maker thereof for his said wife, now R., and she made no waiver of her rights in his property as his wife, and she never consented to the provisions thereof as far as she was concerned, and as his wife she is entitled to her share of said real estate notwithstanding the terms of said will, that said will was never probated in this court or elsewhere, and that never was offered for probate anywhere.

Wherefore your petitioner represents that such will has been lost, spoliated or destroyed, and this subsequent to the death of the said G. S. and while such will was in full force and effect in law and in fact.³

732. ALLEGATIONS OF UNDUE INFLUENCE.

Plaintiff states that said paper writing is not the last will and testament of the said E. R. R., as on its face purports to be, but that the same was made at a time when the mind of the said deceased was impaired by disease and physical

³ From form in record in *Schnee v. Schnee*, 61 Kan. 643.

Form of petition in action for construction of a will, filed in district court, and it was held the district court was without jurisdiction to construe a will and order distribution. *Reischick v. Rieger*, 68 Neb. 348.

suffering and bodily decay and dissolution and by the use by the deceased of strong drugs, stimulants and medicines, so that she had no knowledge or understanding of what she was doing at the time she was induced, as hereinafter stated, to go through the form of executing said will; that at the time said writing is purported to have been executed, the mind of the said deceased was wholly lost, and she knew nothing of the meaning, import or effect of the said writing, and did not know and had not the mental capacity to know or understand what disposition she was making, or which said writing purported to make, of her said property, and she did not in truth and in fact know that the said paper writing even purported to be her last will and testament.

Plaintiffs further state that the defendants, G. D. R., alias R. B. R., and defendant, J. F., conspired and confederated together for a time prior to the purported execution of said writing to cheat and defraud all of the other heirs of the said deceased out of their share and interest in the estate of their mother and grandmother respectively; that for the purpose of carrying out the said conspiracy and design to so cheat and defraud these plaintiffs, they worked upon the mind and feelings of the deceased, their mother, by false and fraudulent representations and statements and thereby undertook to and did prejudice the deceased against these plaintiffs; that at the time and just prior to the time of the purported execution of said paper writing the defendants last above named exercised and possessed an undue and empowering influence upon the mind and actions of the said deceased and that on account of the feeble and demented condition of the deceased at the time of the execution or pretended execution of said writing, and on account of false and fraudulent representations and statements made by them to the deceased, and on account of their undue and empowering influence over the mind and actions of the deceased, they having previously prepared with their hands said paper writing, went through the form of having the same executed.

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733. ACTION TO SET ASIDE WILL ALLEGING (1) TESTAMEN-
TARY INCAPACITY, AND (2) UNDUE INFLUENCE.

Plaintiff states that heretofore, to-wit: on or about the day of, 19.., one F. H. died in the city of, State of, leaving surviving him as his heirs at law, his children, the plaintiff herein, and defendants, J. H. H., W. H., A. G., F. H. and M. H. and that defendant C. A. H. is the husband of said M. H.; that thereafter on or about the day of, 19.., there was presented to the probate court in and for the city of, State of, a paper writing purporting to be the last will and testament of the said F. H., which writing is in words and figures as follows, to-wit: (here copy will).

Plaintiff further says that the defendant M. V. T. Com-
pany, is now and at all times hereinafter mentioned was a
corporation, etc., and was by said probate court duly ap-
pointed executor under said will, and is named therein as
and at the time herein mentioned were corporations, etc.,
and defendant J. F. B. is now and at the time of the
probating of said will was the pastor in charge of the Z. G. L.
Church; and that the defendants H. F. H., W. F. H., and
A. R. H., are the sons and only living descendants of the
defendant J. H. H., and that each and all of the defend-
ants in this cause have an interest in the result of this suit,
either as devisees or legatees under said will.

Plaintiff further says that the said paper writing was ad-
mitted to probate by the said probate court and received
as the last will and testament of the said F. H., deceased.

Plaintiff further states that for several years prior to his
death, and prior to the said day of, 19.., the
said F. H. made his home with defendants C. A. H. and M.
H., and was completely under their influence, domination and
control; that the said F. H. was far advanced in years, to-
wit: years of age or more, and was in feeble health
in consequence of which he was of weak and feeble mind
at the time when the said paper writing alleged and pur-
porting to be his last will was executed, that he was not

of a determined mind, and that his mind and memory had become and was impaired; that he had become of unsound mind within the meaning of the law, incapable of understanding, realizing or appreciating what disposition he had made or was making of his affairs therein, and that he did not comprehend or understand its meaning or effect; that the defendants C. A. H. and M. H. knowing the exact condition of the said F. H.'s mind at said time, by their request and entreaties prevailed upon his making a will in their favor and to the almost total exclusion of plaintiff and that acting under and pursuant to the said request and entreaties the said F. H. made and executed the will hereinbefore referred to, not understanding, realizing or appreciating what disposition he had made or was making of his property therein, and not comprehending or understanding the meaning thereof; and that said defendants C. A. H. and M. H. knowing the condition of the mind of said testator as aforesaid, by words and acts towards him, unduly influenced and prejudiced the mind of the said testator against the plaintiff by wrongfully telling him that plaintiff had no love or affection for him, and that he, plaintiff, was ungrateful towards him, by reason whereby the said testator was induced to make and execute said will, whereby he almost totally disinherited plaintiff and two other of his children and that as a result of said undue influence, and of said misrepresentation, the said testator gave and devised to said defendant M. H., considerably more than one-half of all his property.

Plaintiff therefore says that the said writing which was admitted to probate is not the last will and testament of said F. H. and should not be upheld and treated as such but should be set aside and declared to be of no force and effect in law.

Wherefore plaintiff prays that an issue may be made up as to whether the said writing purporting to be the last will of said F. H., deceased, is his last will or not, and that upon a trial and hearing it may be declared to be not his last will and testament; and for such other and further relief and orders in the premises as may be deemed meet and proper.

CHAPTER LXIII.

WORK AND LABOR.

734. Action for amount claimed to be due for work and labor performed for the defendant.
735. Action for balance due on contract for work and labor, setting up waiver of condition providing for liquidated damages.

734. ACTION FOR AMOUNT CLAIMED TO BE DUE FOR WORK AND LABOR PERFORMED FOR THE DEFENDANT.

Comes now the plaintiff, W. R., and complains of the defendants, F. W. B. and H. M., and for cause of action alleges that the said defendants, during the year 19.., were partners engaged in operating a stock farm in L. county, Nebraska.

That this plaintiff engaged in work and labor for said defendants on said farm and did perform work and labor on the farm operated by the defendants and located near M., in L. county, Nebraska, which said work and labor was done and performed between , and , 19.., at the agreed price of dollars per month; that by reason of said performance of said work and labor so done and performed defendants are indebted to the plaintiff in the sum of dollars, with interest thereon from the day of , 19...

Wherefore plaintiff prays a work and labor judgment against the defendants for the sum of dollars and interest at the rate of per cent. per annum from the day of , 19.., and for costs of suit.¹

735. ACTION FOR BALANCE DUE ON CONTRACT FOR WORK AND LABOR, SETTING UP WAIVER OF CONDITION PROVIDING FOR LIQUIDATED DAMAGES.

Plaintiff states that on or about, the day of ,

¹ Form in Baldwin v. Rhea, 33 Neb. 319.

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19.., the plaintiff and defendants entered into an agreement in writing, signed by both parties, the original of which is hereto annexed and marked "exhibit A" and made a part of this petition. That therein the said plaintiff agreed to erect and complete a booth for the defendants in the south half of section of the A. B. of the L. P. E. in the city of, according to certain plans, specifications and detailed drawings, prepared by V. & W., architects, and to do said work in accordance with the regulations of the exposition authorities, at and for the sum of dollars, which the defendants agreed to pay the plaintiff for said work, labor and material, in the erection and construction of the said booth, agreeing to pay them one-half of said price when all of the material was delivered to the A. B., and the balance to be paid on the completion and acceptance of the work.

That plaintiff agreed in said contract to complete the said work on, or before, ... , 19.., but that it did not complete the said work until on, or about, the day of, 19.., for the following reasons, to-wit: Plaintiff was hindered, prevented and delayed in the erection and construction of the said booth by the defendants and their agents; the plaintiff was required to do a large amount of extra work by the defendants on the said booth, before it could proceed with the completion of the same, and was required to do a large amount of extra work, not included in the plans, specifications, or drawings, in order to put the space on which the booth was to be erected in a proper condition for the work called for to be done.

That defendants took possession thereof on, or about, the day of, 19.., and continued in possession thereof thereafter. That the defendants have waived the requirements in said contract, calling for the completion of the said booth on the day of, 19..

That the plaintiff has fully complied with its said contract, completed said building, and delivered the same to the defendants, and that the same has been accepted by them.

That plaintiff further states the fifth clause of said con-

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tract provided "that for each and every day after, 19.., that the completion as described of said booth is delayed the actual and liquidated damages to the second party shall be dollars, per day." That it was the intention of said parties and of said contract to provide for a penalty for the failure of the plaintiff to complete said booth through any fault of its own and to provide security to the defendants for the actual damages that it might sustain by reason of delay due to plaintiff's own fault. That the defendants suffered no damage or loss by reason of said delay, in the completion of said booth on the day of, 19..

That the defendants have paid the plaintiff, on account of the said contract, for the erection and completion of the said booth, the sum of dollars. That there is still due and owing to the plaintiff a balance of dollars under said contract.

Wherefore, etc.²

² **Allegation of performance.** In a suit for wages under a special contract, an averment that plaintiff has performed all the conditions thereof so far as defendant permitted is a sufficient averment of performance unless attacked by motion. *Culbertson Irrigating & Water Power Co. v. Wildman*, 45 Neb. 663.

Where a person claims to have been employed for a stated time at a stipulated salary per month, and sues to recover for services rendered under such employment, and the defendant denies any liability, he may offer testimony tending to show that the plaintiff was at the same time engaged in the services of another. *Phinney v. Bronson*, 43 Kan. 451.

Allegations of value in a pleading are not to be taken as true by a failure to deny them; and in all cases founded upon a *quantum meruit*, where the value of the services is not expressly admitted, the question of value is in issue and must be proved, and submitted to the jury. *Campbell v. Brosius*, 36 Neb. 792.

An omission, in a bill of particulars for work and labor, to state the time at which the work sued for was done, is not a fatal defect, or one sufficient to justify reversing a judgment rendered thereon. *Mugan v. Haley*, 16 Kan. 68.

The petition to recover for work, otherwise stating facts sufficient to constitute a cause of action, but omitting an allegation of the time when the work was done, held to be sufficient on demurrer. *Backus v. Clark*, 1 Kan. 287.

Pleadings in action for breach of contract of hiring for a certain period. *Beyle v. Reid*, 31 Kan. 113.

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Form of petition by a minister against the congregation for salary. Myers v. First Presbyterian Church of Perry, 11 Okla. 544.

Form of petition in action for amount due for work and labor in drilling a well. Roberts v. Drehmer, 41 Neb. 306.

It is no defense to an action for day wages that the work was unskillfully done. Clark v. Fensky, 3 Kan. 385.

CHAPTER LXIV.

DEMURRER.

- 736. Demurrer for want of jurisdiction of the person of defendant.
- 737. Demurrer for want of jurisdiction of the subject of the action.
- 738. Demurrer for lack of legal capacity to sue.
- 739. Demurrer on ground that another action is pending for the same cause.
- 740. Demurrer on ground of defect of parties.
- 741. Demurrer on ground that several causes of action are improperly joined.
- 742. Same—Another form.
- 743. Demurrer on ground that petition does not state a cause of action.
- 744. Joint demurrer.
- 745. Demurrer to the answer of defendant on ground that it does not state defense.
- 746. Demurrer to defenses in the answer.
- 747. Demurrer to reply.
- 748. Demurrer to counterclaim.
- 749. Demurrer to petition on a note by an endorsee which fails to allege the endorsement by which plaintiff claims title.¹
- 750. Joint demurrer to complaint or petition to set aside judgment alleged to have been obtained by fraud, false testimony, etc.
- 751. Demurrer to bill seeking injunction.

736. DEMURRER FOR WANT OF JURISDICTION OF THE PERSON OF DEFENDANT.

Now comes the defendant in the above entitled cause of action and demurs to plaintiff's petition for the reason:

1. That it appears on the face of plaintiff's petition that this court has no jurisdiction of the person of the defendant.¹

¹ **Grounds of demurrer by defendant.** Comp. Laws of Okla. 1909, sec. 5629; Cob. Ann. Stat. of Neb. 1911, sec. 1097; Gen. Stat. of Kan. 1909, sec. 5686.

There are but six grounds or causes of demurrer to a petition under the code, and to render a demurrer effective one at least of such grounds or causes must be substantially stated. Boltdt v. Budwig, 19 Neb. 739.

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737. DEMURRER FOR WANT OF JURISDICTION OF THE SUBJECT OF THE ACTION.

Now comes the defendant in the above entitled cause of action and demurs to plaintiff's petition for the reason:

1. That it appears on the face of the petition that this court has no jurisdiction of the subject of the action.

738. DEMURRER FOR LACK OF LEGAL CAPACITY TO SUE.

Now comes the defendant and demurs to the petition of plaintiff herein for the reason:

1. That it appears on the face of the petition that the plaintiff has not the legal capacity to sue.²

739. DEMURRER ON GROUND THAT ANOTHER ACTION IS PENDING FOR THE SAME CAUSE.

Now comes the defendant and demurs to the petition of plaintiff for the reason:

1. That there is another action pending between the same parties for the same cause.

740. DEMURRER ON GROUND OF DEFECT OF PARTIES.

Now comes the defendant and demurs to the petition of plaintiff for the reason:

² **Want of legal capacity to sue** appearing on the face of the pleading is properly raised by demurrer. *Clark v. Carey*, 41 Neb. 780.

Want of legal capacity to sue cannot be taken advantage of under a general demurrer that the petition does not state facts sufficient to constitute a cause of action. *Sanborn & Follett v. Gall*, 12 Neb. 318.

An action commenced by a partnership in the firm name in Nebraska, in which the petition fails to state that the firm was "formed, for the purpose of carrying on any trade or business or for the purpose of holding any species of property in this state," the pleading may be attacked by demurrer for want of capacity to sue. *Church v. Callihan*, 49 Neb. 542.

A demurrer upon the ground of want of legal capacity of the plaintiff to sue will lie only where it appears on the face of the petition that the plaintiff, because of infancy, idiocy, want of authority, etc., is under legal disability. *Farrell v. Cook*, 16 Neb. 483.

A demurrer on this ground can only be sustained where the petition discloses some legal incapacity attaching to the plaintiff, such as infancy, lunacy, and the like. *Winfield Town Co. v. Maris*, 11 Kan. 105.

Failure to object to plaintiff's capacity to sue where it appears on the face of the petition is a waiver of the objection. *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21; *Black v. Berry*, 40 Kan. 489.

DEMURRER.

1. That it appears on the face of plaintiff's petition that there is a defect of parties plaintiff (or defendant) in this that (set out the particulars in which defect appears).³

741. DEMURRER ON GROUND THAT SEVERAL CAUSES OF ACTION ARE IMPROPERLY JOINED.

Now comes the defendant and demurs to the petition of plaintiff herein for the reason:

1. That it appears on the face of the petition that several causes of action are improperly joined. (Set out particulars of misjoinder.)

742. SAME—ANOTHER FORM.

Defendant herein demurs to the plaintiff's petition, filed herein, for the reason:

³ The demurrer should point out the parties improperly omitted, and where this is not done the overruling of the demurrer cannot be regarded as erroneous. *Betterment Co. v. Blaes*, 75 Kan. 69.

A demurrer for defect of parties defendant will not lie unless it appears on the face of the pleading demurred to that necessary parties defendant are wanting. *Hardy v. Miller*, 11 Neb. 305.

A defect of parties plaintiff appearing on the face of the petition must be objected to by demurrer on that ground, or it will be waived. *Castile v. Ford*, 53 Neb. 507.

The objection cannot be taken by a general demurrer that the petition does not state facts sufficient to constitute a cause of action. *Sanborn & Follett v. Hale*, 12 Neb. 318.

A defect of parties within the meaning of the statute is a lack of parties, not an excess, so that a petition alleging a cause of action against a railway company and certain persons named as receivers of the property is not demurrable on the ground that it shows a defect of parties. *Union Pacific Ry. Co. v. Smith*, 59 Kan. 80; *Boldt v. Budwig*, 19 Neb. 739.

Where there appears to be a defect of parties upon the face of the petition the defendant may demur thereto upon that ground, and where the petition does not disclose the defect the objection may be taken by answer. *Chicago and Atchison Bridge Co. v. Fowler*, 55 Kan. 17.

The objection to defect of parties is waived, where the defect appears on the face of the petition and no demurrer is filed. *Foster v. Board of County Commissioners of the County of Lyon*, 63 Kan. 43; *Union Pacific Ry. Co. v. Kindred*, 43 Kan. 134; *Bishop v. Huff*, 81 Neb. 729; *Nason v. Nason*, 79 Neb. 582; *Engel v. Dado*, 66 Neb. 400; *Union Pac. R. Co. v. Vincent*, 58 Neb. 171; *Castile v. Ford*, 53 Neb. 507.

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1. That the two causes of action attempted to be set up in said petition cannot be united in the same petition.

2. That it does not appear by said petition that the two causes of action attempted to be set up arose out of the same transaction or transactions connected with the same subject of action.

3. The two causes of action do not belong to one class as required by law.

4. The two causes of action do not affect all the parties to this action and there is a misjoinder of parties.⁴

743. DEMURRER ON GROUND THAT PETITION DOES NOT STATE A CAUSE OF ACTION.

Now comes the defendant and demurs to the petition of plaintiff herein for the reason:

1. That the petition does not state facts sufficient to constitute a cause of action.⁵

⁴ A demurrer for misjoinder of causes of action will lie only where the joinder itself is forbidden, such as uniting a cause of action in tort with one arising upon contract. *Hardy v. Miller*, 11 Neb. 395.

Where the petition contains two or more causes of action which cannot be properly united in the same action, the fact that they are blended and commingled in one statement, instead of being set forth in separate counts, will not deprive the defendant of his right to demur for misjoinder. *Benson v. Battey*, 70 Kan. 288.

Where a misjoinder of causes of action appears on the face of the petition, the question of misjoinder must be raised by demurrer and cannot be taken advantage of by answer. *Lyons v. Berlau*, 67 Kan. 426; 73 Pac. 52.

The question whether several causes of action were stated in the petition, and not separately stated and numbered, cannot be raised or presented by a demurrer. *Ellsworth v. Rossiter*, 46 Kan. 237.

Defect waived. If the defect of a misjoinder of cause of action be not taken advantage of, either by demurrer or answer, it is waived. *Claire v. Claire*, 10 Neb. 54; *Goble v. Swobe*, 64 Neb. 838.

The joinder of a cause of action in contract with a cause of action in tort is a misjoinder. *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173.

⁵ **Objection to a petition on the ground that it does not state facts sufficient** to constitute a cause of action can be made only by demurrer, or by the objection to the introduction of evidence at the trial. It cannot be raised by motion to strike the petition from the files. First

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744. JOINT DEMURRER.

C. D. and E. F., defendants herein, demur jointly to the plaintiff's petition filed herein, for the reason, etc. (set out grounds).^a

745. DEMURRER TO THE ANSWER OF DEFENDANT ON GROUND THAT IT DOES NOT STATE DEFENSE.

The plaintiff for reasons appearing on the face thereof, demurs to the second and third defenses in defendant's answer set out, for the reasons following, to-wit:

National Bank v. Cochran, 17 Okla. 538; *Armstead v. Neptune*, 56 Kan. 750.

That an action is barred by the statute of limitations is ground for demurrer only when it affirmatively so appears on the face of the petition. *Best v. Zutavern*, 53 Neb. 604; *Hunt v. Jetmore*, 9 Kan. App. 333; *Mentzer v. Burlingame*, 71 Kan. 581; *Leavenworth v. Douglass*, 59 Kan. 416; *Parsons Water Co. v. Hill*, 46 Kan. 145.

Where it appears by a pleading that more than five years have elapsed since the maturity of a note before the bringing of an action thereon, but facts are alleged in the pleading which, if true, suspended the running of the statute for such time that the bar thereof had not fallen at the commencement of the action, a demurrer to the pleading on the ground that it shows upon its face that it is barred by the statute of limitations should be overruled. *Christie v. Scott*, 77 Kan. 257.

If the petition, in an action for breach of covenants of warranty, does not show when the cause of action accrued, by reason of ouster and dispossession of the premises, the statute of limitations cannot be interposed by a general demurrer. *Mills v. Rice*, 3 Neb. 76.

Petition will be given liberal construction. Where a demurrer is filed to a petition on the ground that it does not state facts sufficient to constitute a cause of action, without first presenting a motion to have the allegations of the petition made more definite and certain the statements of such petition will be liberally construed in favor of the pleader. *Upham v. Head*, 74 Kan. 17; *Bowersox v. Hall & Co.*, 73 Kan. 99; *Rathburn v. B. & M. R. R. Co.*, 16 Neb. 441.

An objection to the admission of any testimony is not the best method of testing the sufficiency of a petition, and upon such objection the court should interpret its allegations very liberally, and sustain the pleading if it can reasonably be done. *Missouri K. & T. R. Co. v. Murphy*, 75 Kan. 707.

Where a petition discloses that the defendant has invaded the plaintiff's legal rights under circumstances making the former liable for nominal damages, a general demurrer to the petition should be overruled. *Hallstead v. Perrigo*, 87 Neb. 128.

^a It is a well-settled rule of practice that where several defendants

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That said second and third defenses, and neither of them, state facts sufficient to constitute a defense to plaintiff's petition, or any cause of action therein stated.

Wherefore, plaintiff repeats the prayer of his petition.⁷

746. DEMURRER TO DEFENSES IN THE ANSWER.

Plaintiff demurs to paragraph number of defendant's answer filed herein, for the reason, etc. (set out grounds).⁸

747. DEMURRER TO REPLY.

The defendant herein demurs to the reply of the plaintiff filed herein, for the reason, etc. (set out grounds).

748. DEMURRER TO COUNTERCLAIM.

The plaintiff herein demurs to the counterclaim contained in defendant's answer filed herein, for the reason, etc. (set out grounds).

749. DEMURRER TO PETITION ON A NOTE BY AN ENDORSEE WHICH FAILS TO ALLEGE THE ENDORSEMENT BY WHICH PLAINTIFF CLAIMS TITLE.

Now comes the above named defendant and demurs to the petition filed herein, for the reason that said petition does

join in a general demurrer to a petition which states a cause of action as to one of them, the demurrer will be overruled. *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192.

⁷ Form in *Ottawa, O. C. & C. G. Rld. Co. v. Larson*, 40 Kan. 301.

⁸ Where a petition contains more than one count, and a general demurrer is directed against the entire pleading, and is not limited to a particular cause of action, if either count is sufficient the demurrer must be overruled. *Alexander v. Thacker*, 30 Neb. 614; *Emerson v. Botkin*, 26 Okla. 218.

A general demurrer to separate defenses of an answer searches the record, and if the petition does not state facts sufficient to constitute a cause of action the demurrer should be sustained to it. *Bartholomew v. Guthrie*, 71 Kan. 705; *State ex rel. v. Board of Comm'rs of Pawnee Co.*, 12 Kan. 331; *Johnson v. Wynne*, 64 Kan. 138.

An answer setting up several defenses, demurred to on the ground that it does not state facts sufficient to constitute a cause of action or a defense, will be held sufficient where the demurrer is not directed against any particular defense, and any one of the defenses alleged is good. *Flint v. Dulany*, 37 Kan. 332.

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not state facts sufficient to constitute a cause of action against defendant, in this, to-wit, said petition does not aver that the note mentioned therein was ever endorsed by the payee thereof to L. A. D., nor does said petition show that the plaintiff has any claim or legal interest in said note, or any lawful right to institute this action.

750. JOINT DEMURRER TO COMPLAINT OR PETITION TO SET ASIDE JUDGMENT ALLEGED TO HAVE BEEN OBTAINED BY FRAUD, FALSE TESTIMONY, ETC.

A. F. M. and T. W., two of the defendants in the above-entitled cause, jointly demur to the bill or petition of the plaintiff herein, and for causes assign the following:

1. That said bill or petition does not state facts sufficiently to constitute a cause of action.

2. That on the face of said bill or petition the plaintiff is not entitled to the relief therein prayed for, or to any relief.

3. That said bill or petition shows upon its face that the judgment therein referred to and sought to be relieved against, was and is a final and conclusive adjudication between the parties hereto of all the several matters now in this proceeding sought to be reopened and relitigated, and that said judgment was and is as to all said matters a conclusive and binding estoppel against the plaintiff to have or maintain this action.

4. That said bill or petition contains no averments of any fraudulent acts or conduct of these defendants, or either of them, in procuring the said judgment, therein referred to, sufficient in law or equity to warrant the relief prayed for, or any relief against said judgment.

5. That on the face of said bill or petition the alleged fraudulent conduct of these defendants therein complained of is based upon and relates wholly to matters which are shown by said bill or petition to have been directly involved in the issues and tried, and finally adjudicated and determined by the court in the cause therein referred to, and do not relate to any matters collateral or extrinsic thereto.

6. That said bill or petition contains no averment or allega-

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tion of any fraudulent act, artifice or conduct of these defendants, or either of them, whereby plaintiff was misled, deceived or in any wise prevented from procuring and adducing any evidence it might upon the issues in said cause in the trial thereof.

7. That said bill or petition contains no allegations showing due or legal diligence, or any diligence whatever, on the part of the plaintiff in procuring or introducing any evidence it might on the trial of said cause upon all or any of the issues therein and now sought in this proceeding to be reopened and retried.

751. DEMURRER TO BILL SEEKING INJUNCTION.

Defendant demurs to the petition of plaintiff filed herein for the reasons:

1. Because the petition does not state facts sufficient to constitute a cause of action.

2. Because the plaintiff has a full, complete and adequate remedy at law.

3. Because the court has not the power to hear and determine the cause, and is therefore without jurisdiction.

4. Because the petition does not state facts sufficient to entitle plaintiff to the relief sought.⁹

⁹ **What not grounds for demurrer.** The failure to attach an exhibit, to which reference is made in a pleading, is not of itself ground for a demurrer, provided the matters alleged in such pleadings amount to a cause of action or defense. *Home Fire Ins. Co. v. Arthur*, 48 Neb. 461.

Indefiniteness and informality in a pleading cannot be reached by a demurrer, nor by an objection to the introduction of evidence. *Burnette v. Elliott*, 72 Kan. 624; *Mill v. Rice*, 3 Neb. 76.

Ordinarily mere generality of statement in a petition is to be cured by motion, and not by demurrer; and where all essential facts are stated, though in general terms, a demurrer will not lie. *McPherson v. Kingsbaker*, 22 Kan. 451.

That several defenses set forth in an answer are inconsistent, cannot be taken advantage of by demurrer. The proper course is to compel the party to elect on which of the inconsistent grounds he will rely. *Munn v. Taulman*, 1 Kan. 243.

Misjoinder of parties is not ground for demurrer. *Marth v. Kingfisher*, 22 Okla. 602.

Irrelevant, redundant or improper matter in a pleading cannot be reached by demurrer. *Sparks v. Smeltzer*, 77 Kan. 44.

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The question of inconsistency or departure in pleading cannot be raised by demurrer. *Walters v. Chance*, 73 Kan. 680.

That more than one ground of recovery is pleaded in the petition or that the grounds set up for recovery may not be entirely consistent with each other affords no reason for sustaining a demurrer which challenges only the sufficiency of the facts alleged. *Bichel v. Oliver*, 77 Kan. 696.

Under the statute, which provides that claims presented to the probate court for allowance shall be heard summarily and without the form of pleading, it is not a proper practice to interpose a demurrer to a claim therein. *Hayner v. Trott*, 46 Kan. 70.

A petition, alleging that a writ "was issued out of and under the seal of the court," held, sufficient on demurrer, although, by the copy of the writ set forth in the petition, it appears to have no seal. The fact that the writ had no seal must be taken advantage of by answer. *McCracken v. Todd*, 1 Kan. 146.

A demurrer admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader. *American Water-Works Co. v. State ex rel.*, 46 Neb. 194; *Hallstead v. Perrigo*, 87 Neb. 128; *City of Crawford v. Darrow*, 87 Neb. 494; *Spalding v. Douglass Co.*, 85 Neb. 265.

A demurrer does not admit the truth of the allegations of the pleading attacked except for the purpose of determining their legal effect. *Jacobs v. Vaill*, 67 Kan. 107.

A demurrer to a petition must specify the grounds of the objection, and where there is nothing in it but the following, "and now come the above-named defendants and demur to the petition of the plaintiff herein," it raises no question for the consideration of the court. *Tootle, Hosea & Co. v. Berkley*, 57 Kan. 111.

Where a demurrer and an answer are filed at the same time, the answer being filed before a decision is had upon the demurrer and the petition in the case contains but one count or cause of action, the answer will be held to have superseded the demurrer, and the trial should proceed as though no demurrer had been filed. *Ryndak v. Seawell*, 13 Okla. 737.

A demurrer to a plea of payment by way of novation was said to have been properly sustained. *Mandeville v. Cudebec*, 74 Kan. 842.

In order to take advantage of a ruling on a demurrer, where the demurrer is sustained, the party must stand upon his pleading held to be defective and not amend or offer to amend. *Board of County Commissioners v. Beauchamp*, 18 Okla. 1; *Worrall Grain Co. v. Johnson*, 83 Neb. 349.

Demurrer and not motion to make more definite and certain is the proper remedy, where there is an absolute want of allegations sufficient to make out a cause of action. *Bradley v. Parkhurst*, 20 Kan. 462.

Where the instrument, which is the basis of the action, is attached, by copy, to the petition and made a part thereof, such copy should be

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made a part of the petition when construing the allegations thereof as against a general demurrer. *Whiteacre v. Nichols*, 17 Okla. 387.

A motion to make more definite and certain cannot be treated as a demurrer and sustained as such. *Ellis v. Reddin*, 12 Kan. 244.

Where upon trial the court finds generally in favor of defendant, the plaintiff cannot be prejudiced by the ruling of the court on his demurrer, if any of the defenses set up were sufficiently pleaded.

Where a frivolous demurrer is overruled the court may refuse to give the defendant time to answer. *Whittenhall v. Korber*, 12 Kan. 472.

The demurrer in a particular case held to run only to a new count of an amended petition. *Schoner v. Allen*, 25 Okla. 22.

ANSWER.

CHAPTER LXV.

FORMS APPLICABLE TO VARIOUS ACTIONS.¹

- 752. General denial.
- 753. Denial for want of knowledge or information of the facts.
- 754. Answer denying knowledge to base a belief.
- 755. General denial and counterclaim.
- 756. Answer admitting plaintiff's cause of action and setting up counterclaim.
- 757. Answer admitting facts alleged and denying conclusions of law.
- 758. Want of jurisdiction, and pleading to merits.
- 759. Separate answer by one of two or more defendants.
- 760. Answer by defendant sued by wrong name.
- 761. Another form.
- 762. Answer by corporation admitting corporate existence.
- 763. Answer admitting incorporation and general denial.

¹ **What the answer shall contain.** Comp. Laws Okla. 1909, sec. 5634; Cob. Ann. Stat. Neb. 1911, sec. 1102; Gen. Stat. Kan. 1909, sec. 5690.

A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false. *Home Fire Ins. Co. v. Decker*, 55 Neb. 346; *Hilmer v. Western Travelers Accident Assn.*, 86 Neb. 285; *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 661.

Every defense to an action, whether partial or entire, must be set up in the answer. *Peet v. O'Brien*, 5 Neb. 360.

Separately stated and numbered. Where answer contains more than one defense they should be separately stated and numbered. *Truitt v. Baird*, 12 Kan. 327; *Mundy v. Wight*, 26 Kan. 173.

Facts should be stated in an answer and not conclusions. *State v. Tanner*, 73 Neb. 104.

The plea *nil debet* puts in issue no fact and cannot be regarded as a defense. *Baldwin v. Burt*, 43 Neb. 245; *Bankers Union v. Favalora*, 73 Neb. 427.

Defects in petition where matters are defectively set forth may be cured by the answer setting them out definitely. *Campbell v. Coonrad*, 22 Kan. 491; *Bierer v. Fretz*, 32 Kan. 329; *Clay v. Hildebrand*, 34 Kan. 694, 704; *Briggs v. Latham*, 36 Kan. 205, 208; *Sill v. Sill*, 31 Kan. 248.

Each defense is to be regarded as if it stood alone, and as if it were the sole defense, and should be complete in itself, unless, by dis-

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- 764. Answer by corporation denying corporate existence.
- 765. Answer denying that defendants are partners.
- 766. Answer by guardian of an infant.
- 767. Answer by guardian of an insane person.
- 768. Answer pleading statute of limitations.
- 769. By corporation—General denial and defense of statute of limitations.
- 770. Answer pleading infancy of defendant.
- 771. Answer pleading statute of frauds.
- 772. Another form—Contract not to be performed within one year.
- 773. Answer denying execution of instrument sued upon.
- 774. Answer denying authority of agent as alleged by plaintiff.
- 775. Release.

tinct and intelligible reference, it be connected with facts stated elsewhere in the answer. *Gilchrist v. Schmidling*, 12 Kan. (264), 210; *Krutz v. Fisher*, 8 Kan. 69.

Answer asking for affirmative relief may be treated as a cross petition in certain cases. *Brown v. Massey*, 19 Okla. 482.

Verification of answer when required in the furtherance of justice should be allowed, even during the trial. *National Mortgage and Deben-ture Co. v. Lash*, 60 Kan. 141; *Chinberg v. Gale Sulky Harrow Mfg. Co.*, 38 Kan. 228; *Wands v. School District No. 71*, 19 Kan. 204; *Perry v. Jones*, 18 Kan. 552.

Amendment of answer is within the discretion of the court. *Scherar v. Prudential Ins. Co.*, 63 Neb. 530; *Hartford Fire Insurance Co. v. Warbritton*, 66 Kan. 93; *Davies v. Jones*, 61 Kan. 602.

Amendment of an answer may be allowed, after verdict, in furtherance of justice. *Lemon v. Dryden*, 43 Kan. 477.

Amendment adding new defense is properly refused during trial of case. *Russell v. Gregg*, 49 Kan. 89.

Amendment may be denied which is offered when case is called for trial where reasonable necessity therefor is not shown. *Federal Betterment Co. v. Reeves*, 77 Kan. 111.

Giving leave to file answer out of time is within the discretion of the court. *Central Branch Union Pacific R. R. Co. v. Andrews*, 41 Kan. 370; *Missouri Pacific Ry. Co. v. Linson*, 39 Kan. 416; *Swertsfe-ger v. State*, 21 Kan. 346. .

Although in justice-court practice the defendant is not required to file an answer, if he does so it will limit the issues as under the ordinary rules of pleading. *Royal Fraternal Union v. Crosier*, 70 Kan. 85.

Inconsistent defenses. A bar by the statute of limitations to an action for a balance struck between partners, and a claim by defendant of a balance due on the same account, praying for an accounting and judgment for the balance, are inconsistent. *Auld v. Butcher*, 2 Kan. 130.

Even if defenses are inconsistent, unless expressly prohibited by statute, they may still be united in one answer, and the pleader cannot

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- 776. Answer of accord and satisfaction.
- 777. Another action pending.
- 778. Former recovery.
- 779. General denial and plea of release in bankruptcy.
- 780. Answer pleading tender before suit.
- 781. Answer making tender after suit commenced.
- 782. Offer by defendant to compromise.
- 783. Another form—Where right to possession of personal property is in dispute.
- 784. Plaintiff's acceptance of offer of compromise.
- 785. Offer to liquidate damages.
- 786. Acceptance of offer to liquidate damages.
- 787. Commencement of answer to supplemental petition.

be compelled to elect between such defenses. *Covington v. Fisher*, 22 Okla. 207.

Plaintiff waives his objection to inconsistent defenses in an answer by replying and joining issue without objection. *Kaufman v. Boismier*, 25 Okla. 252.

The doctrine of election of remedies applies when a party who actually has at hand two inconsistent remedies, with full knowledge of such fact, proceeds to enforce one of these remedies. *Turner v. Grimes*, 75 Neb. 412; *Pekin Plow Co. v. Wilson*, 66 Neb. 115.

Where an answer presents inconsistent defenses, the appropriate remedy is to require defendant to elect upon which defense he will proceed. If there be no motion to require an election, the objection that inconsistent defenses are presented will be waived. *Dunn v. Bozarth*, 59 Neb. 244.

Confession and avoidance, to be available as a defense, must be pleaded. *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94.

Usury as a defense must be pleaded by setting up the facts which constitute the usury. *McKinley-Lanning Loan & Trust Co. v. Aldrich*, 50 Neb. 785; *Anglo-American Land Co. v. Brohman*, 33 Neb. 409.

Contributory negligence as a defense must be pleaded. *O'Brien Co. v. Omaha Water Co.*, 83 Neb. 71; disapproving first paragraph of syllabus in *Chicago B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, and *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566.

Defect of parties if not raised by demurrer or answer is waived. *Maelzer v. Swan*, 75 Kan. 496.

An estoppel to be available as a defense must be specially pleaded. *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605; *Burlington and Missouri River R. R. v. Harris*, 8 Neb. 140; *Holt v. Holt*, 23 Okla. 639; *Tonkawa Milling Co. v. Tonkawa*, 15 Okla. 672.

Facts constituting an estoppel in pais must be specially pleaded. *Palmer Oil and Gas Co. v. Blodgett*, 60 Kan. 712; *Boales v. Ferguson*, 55 Neb. 565; *Scroggin v. Johnston*, 45 Neb. 714; *Blakemore v. Johnson*, 24 Okla. 544.

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752. GENERAL DENIAL.

Defendant, for answer to the petition of plaintiff filed herein, denies each and every allegation contained therein.

Wherefore defendant prays to be dismissed with his costs in this proceeding.²

A party pleading an estoppel *in pais* must show: (1) That the opposing party has made some representation inconsistent with his present position, with intent to mislead the pleader; (2) that the representation so made was known by the maker to be false; (3) that the pleader did not know that the representation was false; (4) that he believed it to be true, and acted upon such belief. *Ergenbright v. Henderson*, 72 Kan. 29.

An estoppel must be pleaded in order to enable a party to avail himself of it on the trial, and must be pleaded with particularity in order to constitute either a cause of action or defense. No intendments are indulged in favor of such plea, but it is incumbent upon the party pleading to aver all the facts essential to its existence. *Cooper v. Flesner*, 24 Okla. 47.

All acts, representations and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received. *Dwelling-House Insurance Co. v. Johnson*, 47 Kan. 1; *Deming Investment Co. v. Shawnee Ins. Co.*, 16 Okla. 1.

A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom. *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861.

A plea of estoppel may be joined with a general denial when the averments by way of estoppel are not inconsistent with such denial. *Blodgett v. McMurtry*, 39 Neb. 210.

² **A general denial in an answer puts in issue only such pleaded facts** as are necessary for the plaintiff to prove in order to enable him to recover. *Herpolsheimer v. Citizens Ins. Co.*, 79 Neb. 685; *Hess v. Dodge*, 82 Neb. 35; *Electric Railway, Light & Ice Co. v. Brickell*, 73 Kan. 274; *Graves v. Norfolk Nat. Bank*, 49 Neb. 437.

A general denial under the code is equivalent to the plea of the general issue at common law, and traverses every material allegation of the petition and puts the plaintiff upon the proof of his cause of action. *Perkins v. Ermel*, 2 Kan. 319.

Facts which merely disprove the allegations of the adverse party do not necessarily constitute new matter within the meaning of the code, and are, as a rule, admissible in evidence under a general denial. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434; *Broadwater v. Jacoby*, 19 Neb. 77; *Wiedeman v. Hedges*, 63 Neb. 103; *Phelps, Dodge & Palmer Co. v. Skinner*, 63 Kan. 364.

An answer consisting of a general denial of each and every allegation

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753. DENIAL FOR WANT OF KNOWLEDGE OR INFORMATION OF THE FACTS.

Defendant for answer to plaintiff's petition, says that he has no knowledge or information of the matters therein stated sufficient to form a belief, and therefore, denies each and every allegation therein contained.

in the petition places in issue all the allegations contained therein. *Donovan v. Fowler*, 17 Neb. 247.

An answer, which denies each and every material allegation of the petition of plaintiff, is sufficient, as a general denial. *Nix v. Gilmer*, 5 Okla. 740.

A denial in an answer of all material allegations in the petition, although faulty, will be held sufficient when assailed for the first time by motion for a new trial, particularly where it is treated at the trial as putting in issue the allegations of the petition. *Rosenbaum v. Russell*, 35 Neb. 513.

A denial of every allegation in the petition prejudicial or adverse to the defendant is not so defective as to present no issue. *Prunty v. Consolidated Fuel & Light Co.*, 82 Kan. 541.

After a general denial, specific denials of the same facts are unnecessary and improper, and the defendant may be required to elect. *School District No. 27 v. Holmes*, 16 Neb. 486.

A denial must be direct and unambiguous, and answer the substance of each direct charge; such facts as are not denied are, for the purposes of the action, taken as true. *Harden v. Atchison and Nebraska R. R. Co.*, 4 Neb. 521.

A denial of the facts averred in the petition "as alleged in the petition" is not a denial of the allegations. *Phoenix Ins. Co. v. Meier*, 28 Neb. 124.

An answer in effect that the defendant is not indebted the full amount claimed in the petition is not a denial of any fact on which the right to recover depends and raises no issue. *Gray v. Elbling*, 35 Neb. 279.

Nor is a statement that the defendant is not indebted to the plaintiff a denial. *Welch v. Adams*, 87 Neb. 681.

An answer which is merely a denial of an indebtedness, without denying the facts upon which such indebtedness is based, where such facts are pleaded in the petition, is merely a denial of the conclusions of law, and is not sufficient to raise an issue of fact. *Jackson v. Green*, 13 Okla. 314.

New matter constituting a defense must be pleaded in the answer. It cannot be introduced under a general denial. *Gran v. Houston*, 45 Neb. 813; *Wiltrout v. Showers*, 82 Neb. 777; *St. Felix v. Green*, 34 Neb. 800; *Prall v. Peters*, 32 Neb. 832; *Bishop v. Stevens*, 31 Neb. 786; *Griffith v. Woolworth*, 28 Neb. 715.

Proof of payment cannot be made under a general denial. *Stevens v. Thompson*, 5 Kan. 182.

754. ANSWER DENYING KNOWLEDGE TO BASE A BELIEF.

Comes now the above named defendant, P. P., and having obtained leave of court to file this, his second amended answer herein, answering for himself alone to the petition of the plain-

Where the action is merely for an alleged existing balance due at the time of the institution of the suit, without reference to the extent or amount of the original liability, evidence of payment is admissible under the general denial. *Jones v. El Reno Mill & Elevator Co.*, 26 Okla. 796.

Evidence to prove a defense in the nature of a confession and avoidance is incompetent under a general denial. *Keens v. Robertson*, 46 Neb. 837; *Ball v. Beaumont*, 63 Neb. 215; *Quick v. Sachsse*, 31 Neb. 312.

Evidence of justification is not admissible under a general denial only. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608; *Mangold v. Oft*, 63 Neb. 397.

Intoxication, when relied on as a defense, must be pleaded. *South Omaha v. Cunningham*, 31 Neb. 316.

The defense that a written instrument was executed and delivered under a mistake of fact must be pleaded specially; it cannot be proved under a general denial of the allegations of the execution and delivery of the writing. *Bee Building Co. v. Weber Gas and Gasoline Engine Co.*, 86 Neb. 326.

Defense consistent with general denial. A general denial and defense that contract sued on was induced by fraud are not inconsistent defenses, and defendant cannot be required to elect upon which he would stand. *DeLissa v. Fuller Coal & Mining Co.*, 59 Kan. 319.

A general denial and a plea of contributory negligence are not inconsistent defenses. *Leavenworth Light and Heating Co. v. Waler*, 65 Kan. 514.

Defenses inconsistent with general denial. In an action on an instrument for the payment of money, a general denial in the answer is inconsistent with a plea of part payment. *School Dist. No. 27, v. Holmes*, 16 Neb. 486.

A general demurrer to an answer which includes a general denial of the averment of the petition should be overruled as to that averment. *Guthrie v. Harvey Lumber Co.*, 5 Okla. 774; *Lee v. Mehew*, 8 Okla. 136.

It is not error to strike from an answer averments that could be proven under the general denial, which was one ground of defense set up in the answer. *Auld v. Kimberlin*, 7 Kan. 370.

Where the answer to a petition is a general denial and it appears from the pleadings themselves that it is false it may be stricken from the files as sham. *Upton v. Kennedy*, 36 Neb. 66.

A general denial in the reply puts in issue only the truth of allegations of new matter in the answer. Facts in the nature of a confession and avoidance must be specially pleaded. *Phenix Ins. Co. v. Bachelor*, 39 Neb. 95.

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tiff, says that he has not sufficient knowledge whereon to base a belief as to the truth of the allegations contained in plaintiff's petition, and therefore denies the same.³

755. GENERAL DENIAL AND COUNTERCLAIM.

Defendant for answer to the cause of action alleged in plaintiff's petition filed herein denies each and every allegation therein contained.

For further answer to the petition of the plaintiff herein and for counterclaim defendant says that the plaintiff (set out facts constituting the counterclaim).

Wherefore defendant prays judgment against plaintiff for the sum of dollars and his costs herein.⁴

An answer is sufficient which denies, on information and belief, material allegations of the petition which are matters of public record. *Oakes v. Ziemer*, 61 Neb. 6.

³ Form in *Peck v. Tingley*, 53 Neb. 171.

A denial, though coupled with an allegation showing a lack of knowledge of the matters denied, is sufficient to raise an issue. A party entering such denial is not required to state that he makes the same on information and belief, nor to allege a lack of knowledge or information sufficient to form a belief. *Smith v. Allen*, 63 Neb. 74.

An answer which states "that defendant has not sufficient knowledge or information as to the claim of the plaintiff, and therefore demands and calls for strict legal proof thereof," presents no issue for trial. *National Life Ins. Co. v. Martin*, 57 Neb. 350.

An averment in an answer that the defendant is ignorant of certain matters alleged in the petition, and therefore asks strict proof, is not a denial and presents no issue. *First Nat. Bank of Chicago v. Stoll*, 57 Neb. 758.

⁴ Statutory provisions as to counterclaim. Comp. Laws of Okla. 1909, sec. 5635, *et seq.*; Gen. Stat. of Kan. 1909, sec. 5691; Cob. Ann. Stat. Neb. 1911, sec. 1104.

A counterclaim within the meaning of section 101 of the Code of Civil Procedure of Neb. must be one arising out of the contract or transaction set forth in the petition, or be connected with the subject of the action. *Sheibley v. Dixon County*, 61 Neb. 409.

A cause of action arising upon contract may properly be pleaded by way of set-off in an action brought for the recovery of damages. *Jones v. Driscoll*, 46 Neb. 575; *Raymond v. Green*, 12 Neb. 215.

It is not necessary that a counterclaim should be founded in or arise out of the contract set forth in the petition. It is sufficient if it arises out of the transaction set forth in the petition, or is connected with the subject of the action. *Wyman v. Herard*, 9 Okla. 35.

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756. ANSWER ADMITTING PLAINTIFF'S CAUSE OF ACTION AND SETTING UP COUNTERCLAIM.

Defendant, for answer to the petition of plaintiff filed herein, admits that (set out the facts which the defendant desires to admit).

Any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, and be pleaded as such in any action founded upon contract, whether such action be for a liquidated demand or for unliquidated damages. *Stevens v. Able*, 15 Kan. 439.

A defendant in an action is not restricted to the counterclaim provided for in sections 100 and 101 of the code, but, in a proper case, may seek affirmative relief, either against the plaintiff or against co-defendants, by cross-petition. *Armstrong v. Mayer*, 69 Neb. 187.

Matters accruing subsequently to the bringing of the action cannot be pleaded as a counterclaim. *Gurske v. Kelpin*, 61 Neb. 517.

A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court. *Cob. Ann. Stat. Neb. 1911, sec. 1107; Burge v. Gandy*, 41 Neb. 149.

A claim on the part of a defendant which he will be entitled to set-off against the claim of a plaintiff must be one upon which he could at the date of the commencement of the suit have maintained an action on his part against the plaintiff. *Simpson v. Jennings*, 15 Neb. 671; *Tessier v. Englehart & Co.*, 18 Neb. 167; *Shabata v. Johnston*, 53 Neb. 12; *Burge v. Gandy*, 41 Neb. 149.

There must be privity of parties in order to enable a defendant to plead and prove a set-off, and defendant cannot plead and prove a set-off in favor of himself and against one who is not a party to the suit. *Von Arsdale v. Edwards*, 24 Okla. 41.*

Where defendant sets forth in his answer a cause of action of his own, by way of counterclaim, and asks affirmative relief thereon, he must set forth such cause of action with the same particularity, completeness and exactness that he would if he were the plaintiff, and were setting it forth in his petition. *Allen v. Douglass*, 29 Kan. 293; *Wright v. Bacheller*, 16 Kan. 259.

An answer setting up a counterclaim must state facts, not mere conclusions of law. *Peck v. Trumbull*, 12 Neb. 133.

Insufficient pleading of a set-off in *Mallory v. Leiby*, 1 Kan. 98.

An allegation in an answer, "that the said firm (plaintiff's) was indebted to said defendant, on account, for publishing notices in the newspaper (a copy of which account is set forth in the answer) amounting to \$.; that there are no credits on said account," and asking that it be allowed as an offset, is a good pleading of a set-off. *Anthony v. Stinson*, 4 Kan. 180.

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For further answer to the petition of plaintiff filed herein and for a counterclaim defendant states that the plaintiff is justly indebted to him in the sum of dollars, in this, to-wit: (set out facts constituting counterclaim).

Wherefore defendant prays judgment against the plaintiff for the sum of dollars and his costs herein.

757. ANSWER ADMITTING FACTS ALLEGED AND DENYING CONCLUSIONS OF LAW.

Comes now the defendant in the above entitled action and for answer to the plaintiff's petition alleges;

That it admits each and every allegation of fact contained in the plaintiff's petition, and denies the conclusions of law stated therein.

Wherefore the defendant asks judgment for costs, and for the dismissal of plaintiff's petition.⁵

758. WANT OF JURISDICTION, AND PLEADING TO MERITS.

Defendant for answer to the petition of plaintiff states that this court has no jurisdiction of said alleged cause of action set

In an action upon a supersedeas bond against the principal and sureties thereon, a legal claim due from the plaintiff to such principal may be pleaded as a set-off. *Van Etten v. Kusters*, 48 Neb. 152.

What may not be set up as counterclaim. A cause of action accruing to a defendant, for damages resulting from a conspiracy between the plaintiff and another to bring an unjustifiable suit against him, and the bringing of such suit in pursuance of such conspiracy, cannot be set up by him in the case when brought, as a counterclaim in answer to the plaintiff's demand. *First National Bank of Arkansas City v. Hasie*, 57 Kan. 754.

Damages to defendant's crop by plaintiff's stock cannot be set up as a counterclaim to an action for balance due on a book account. *Christy v. Jones*, 39 Kan. 183.

Averments of the answer held not sufficient to establish a counterclaim where it was claimed a machine sold did not work satisfactorily. *McCormick Harvesting Machine Co. v. Gustafson*, 54 Neb. 276.

After the dismissal by the plaintiff of his cause of action, if the defendant insists upon a trial of his set-off or counterclaim, the plaintiff may make any legal defense to such set-off or counterclaim, and to that end may, in the discretion of the court, be allowed to file proper pleadings presenting such defense. *Sale v. Bugher*, 24 Kan. 311.

⁵ Form in *Kingfisher Board of Education v. Co. Commissioners*, 14 Okla. 322.

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forth in plaintiff's petition, for the reason that (set out facts showing lack of jurisdiction).

For further answer to the petition of plaintiff herein the defendant (set out defenses defendant desires to set up to the merits).^a

759. SEPARATE ANSWER BY ONE OF TWO OR MORE DEFENDANTS.

Defendant E. F., for his separate answer to plaintiff's petition (or complaint), herein states (set out defense).

760. ANSWER BY DEFENDANT SUED BY WRONG NAME.

Defendant, A. B., called in the petition and in the summons in this action X. Y., for answer to plaintiff's cause of action states: (set out defense).

761. ANOTHER FORM.

Defendant for answer to the petition of plaintiff filed herein states that his true name is C. D. and that he has always been known by that name, and not by the name of E. F., in which name he has been sued as defendant in this action.

^a **Want of jurisdiction of the person of defendant**, and misnomer, as well as matters in bar, must be pleaded by answer where not earlier appearing on the face of the record. *Burlington Voluntary Relief Department v. Moore*, 52 Neb. 719.

Under the provisions of the Code of Neb. it is proper to plead as a distinct defense any facts not disclosed by the petition from which it appears that the court has not acquired jurisdiction of the person of the defendant or the subject of the action. *Anheuser-Buch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Hurlburt v. Palmer*, 39 Neb. 158.

Where the want of jurisdiction does not appear upon the face of the record, it may be pleaded with other defenses in the answer. *Templin v. Kimsey*, 74 Neb. 614; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801.

The filing of an answer to the merits of the case is a waiver of the special plea to jurisdiction, and amounts to a general appearance in the case for all purposes. *Winfield National Bank v. McWilliams*, 9 Okla. 493.

Objection to the name by which the plaintiff designates himself cannot be raised by an objection to the jurisdiction of the court. *Davis v. Jennings*, 78 Neb. 462; *Smelt v. Knapp*, 16 Neb. 53.

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762. ANSWER BY CORPORATION ADMITTING CORPORATE EXISTENCE.

Defendant A. B. & Co. for answer to the petition of plaintiff herein admits that it is a corporation organized under the laws of the State of

Defendant further answering states (or denies) (set out defense).

763. ANSWER ADMITTING INCORPORATION AND GENERAL DENIAL.

Now comes the defendant, in the above entitled cause, and for answer to the petition filed by the plaintiff admits that it is a corporation organized under and by virtue of the laws of the State of, and that it is operating certain lines of railroad in the State of

Further answering the said petition, the defendant denies each and every allegation therein contained.⁷

764. ANSWER BY CORPORATION DENYING CORPORATE EXISTENCE.

Defendant, designated in the petition herein and sued as A. B. & Co., a corporation, denies that it is a corporation.

(Affidavit.)⁸

⁷ Form in *Koenig v. C. B. & Q. Ry. Co.*, 27 Neb. 699, 702.

⁸ A general denial does not place in issue the pleaded existence of a corporation. *Fletcher v. Co-operative Publishing Co.*, 58 Neb. 511; *Dietrichs v. Lincoln & Northwestern R. R. Co.*, 13 Neb. 43; *National Life Ins. Co. v. Robinson*, 8 Neb. 452.

A denial that the relator "is a corporation duly organized under the laws of the State of" does not put in issue the relator's corporate existence. *State ex rel. v. Board of County Commissioners of Cass County*, 53 Neb. 767.

A denial that plaintiff "is a corporation duly organized as a national bank under the act of Congress of, or any other act" does not put in issue the plaintiff's corporate existence. *First Nat. Bank of Plattsmouth v. Gibson*, 60 Neb. 767.

Want of power to make a contract upon which a corporation is sued, where such incapacity does not appear from the petition, cannot be raised under a general denial. *Royal Fraternal Union v. Crosier*, 70 Kan. 85.

Foreign corporation doing business in state. In order that a defendant sued by a foreign corporation may avail himself of the bar provided by the General Statutes of Kan. it must be pleaded and must appear

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765. ANSWER DENYING THAT DEFENDANTS ARE PARTNERS.

Defendants, A. B. and C. D., sued herein as copartners, doing business under the firm name of B. and D., deny that they are a partnership or that they were doing business as copartners at any of the times mentioned in plaintiff's petition, and deny that they are now copartners or that they have been conducting business together under the firm name of B. & D.

(Affidavit.)

from the evidence: (1) That the plaintiff is a foreign corporation; (2) that it is doing business in this state; (3) that it has not obtained a certificate of the secretary of state that statements provided for in that section of the statute have been properly made. *Standard Stock Food Co. v. Jasper*, 76 Kan. 926.

The defense that a foreign corporation has not been granted authority to carry on business within the state is not raised by a general denial, but must be specially pleaded. *Leonard v. American Steel & Wire Co.* 73 Kan. 79.

The fact that the defendants knew the plaintiff was a foreign corporation at the time the contract in question was made does not estop them to plead non-compliance with the statute regulating foreign corporations. *Osborne & Co. v. Shilling*, 74 Kan. 675.

Nor will the fact that the defendants set up a counterclaim in the answer, asking for the damages resulting from the breach of the contract by plaintiff, operate as a waiver of their right to ask for an abatement of the action. *Osborne & Co. v. Shilling*, 74 Kan. 675.

Defense of *ultra vires* is not available under a general denial. *Citizens State Bank v. Pence*, 59 Neb. 579.

In an action by an association on a subscription in its favor which stated that it was made for the purpose of securing the state fair to be located at a designated place, a general denial did not put in issue the corporate existence of the State Board of Agriculture, the body by which such location was fixed. *Kelly v. Nebraska Exposition Association*, 52 Neb. 355.

An answer setting up the defense that the plaintiff is a foreign corporation, and that it has failed to comply with the law of the state in order to entitle it to do business sets up no defense, as it is not the intention of the legislature to deprive the corporation of the right to sue in its courts or render void the contract made by it in the state. *Cooper v. Ft. Smith & W. R. Co.*, 23 Okla. 139.

A statement in an answer that, if a contract was executed by a corporation, it is void because *ultra vires*, is an admission that the contract was made, notwithstanding a general denial in another paragraph of said pleading. *Clague v. Tri State Land Co.*, 84 Neb. 499.

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766. ANSWER BY GUARDIAN OF AN INFANT.

Defendant A. B., an infant under the age of years, by X. Y. his guardian (or next friend) for answer to the petition of plaintiff herein states (set out answer).

767. ANSWER BY GUARDIAN OF AN INSANE PERSON.

Defendant C. D., a person of unsound mind (or an insane person) by X. Y. his guardian, for answer to the petition of plaintiff herein states (set out answer).

768. ANSWER PLEADING STATUTE OF LIMITATIONS.

Defendant for answer to the petition of the plaintiff filed herein states that the cause of action set forth in said petition did not accrue within years next before the commencement of this action.^a

^a The statute of limitations as a defense where it does not appear on the face of the pleadings, must be pleaded. *Croan v. Baden*, 73 Kan. 364; *Reed v. Humphrey*, 69 Kan. 155; *Chellis v. Coble*, 37 Kan. 558; *Parker v. Berry*, 12 Kan. 276; *Dufrene v. Anderson*, 67 Neb. 136; *Hobson v. Cummins*, 57 Neb. 611; *Eayrs v. Nason*, 54 Neb. 143; *Hanna v. Emerson*, 45 Neb. 708; *Atchison & Nebraska R. R. Co. v. Miller*, 16 Neb. 661; *Reaves v. Turner*, 20 Okla. 492; *Betz v. Wilson*, 17 Okla. 383.

The time when the statute began to run must be definitely stated and the mere allegation that the action is barred is not sufficient. *Barnes v. McMurtry*, 29 Neb. 178; *Scroggin v. National Lumber Co.*, 41 Neb. 195.

The statute of limitations of a foreign state must be alleged and proven to be available as a defense. *Richardson v. Mackay*, 4 Okla. 328; *Minneapolis Harvester Works v. Smith*, 36 Neb. 616.

The plea is a personal privilege of the debtor. *Neill v. Burke*, 81 Neb. 125.

The plea of the statute of limitations cannot be interposed by the holder of a tax title, to a note and mortgage not barred at the commencement of the action against the original mortgagor. *Ordway v. Cowles*, 45 Kan. 447.

The plea of the statute is not a technical confession and avoidance. *Webber v. Ingersoll*, 74 Neb. 393.

Where a party pleads an exception to toll the statute of limitations, a general denial puts him upon his proof as to such allegations. *Theis v. Board of County Com'rs*, 22 Okla. 333; *Miller v. Baier*, 67 Kan. 292.

A party who pleads a shorter period of limitation than the one applicable to the case will be held to have waived the benefit of the longer and correct one which might have been pleaded. *Downey v. Atchison, Topeka and Santa Fe R. R.*, 60 Kan. 499.

ANSWER.

769. BY CORPORATION—GENERAL DENIAL AND DEFENSE OF STATUTE OF LIMITATIONS.

1. Defendant for its answer to plaintiff's petition states, that it admits it is a corporation organized under the laws of the State of

Defendant for further answer and defense to said petition denies each and every other allegation of said petition.

Wherefore defendant, having fully answered, prays to be dismissed hence with its costs.

2. And for a further answer and defense to said petition defendant states that, whatever injury accrued to plaintiff herein by reason of any act or thing complained of in plaintiff's petition, or upon any cause of action therein stated, accrued to plaintiff more than years next before filing her petition.

Wherefore, defendant says the alleged cause of action stated in plaintiff's petition was, and is, barred by the statute of limitations; and defendant, having fully answered, prays to be dismissed hence with its costs.

770. ANSWER PLEADING INFANCY OF DEFENDANT.

Defendant for answer to the petition filed herein, states that at the time of the making of said alleged contract (or set out nature of cause of action) the defendant was an infant under the age of twenty-one (21) years.

Wherefore, etc.

771. ANSWER PLEADING STATUE OF FRAUDS.

Defendant for answer to the plaintiff's petition filed herein, states that the contract alleged in plaintiff's petition, on which said cause of action is founded, was a contract for the sale of goods, wares and merchandise for the price of thirty dollars or upwards, and that said contract was not in writing, nor was any memorandum signed by the party to be charged and that nothing was paid as earnest money to bind the bargain, or in part payment, and that no part of the goods so sold have been actually received and accepted by the defendant.

Wherefore, etc.¹⁰

¹⁰ The statute of frauds may be taken advantage of under a general

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772. ANOTHER FORM—CONTRACT NOT TO BE PERFORMED WITHIN ONE YEAR.

Defendant for answer to the petition of the plaintiff states that the alleged contract set forth in the petition of plaintiff was a contract which was not to be performed within one year from the making thereof, and that said contract was not in writing, nor was there any memorandum or note thereof in writing signed by the defendant, the party to be charged, or some other person by him lawfully authorized.

Wherefore, etc.¹¹

773. ANSWER DENYING EXECUTION OF INSTRUMENT SUED UPON.

Defendant denies that he made, executed or delivered the (note, bond or other instrument sued upon).

Wherefore, etc.

(Affidavit.)¹²

774. ANSWER DENYING AUTHORITY OF AGENT AS ALLEGED BY PLAINTIFF.

Defendant denies that one was acting as superintendent for the defendant or that was given any power or authority to act for the defendant as superintendent or to act for the defendant in any capacity whatever.

Wherefore, etc.

(Affidavit.)¹³

denial where plaintiff's cause of action is based upon a contract which must be in writing. *Ross v. Craven*, 84 Neb. 520; *Riiff v. Riibe*, 68 Neb. 543; *Wiswell v. Tefft*, 5 Kan. 156.

¹¹ Answer setting up that contract was not to be performed within one year held sufficient. *Larimer v. Kelley*, 10 Kan. 228.

¹² Allegations of the execution of written instruments are taken as true unless a verified denial is filed. Civil Code of Kan. sec. 110, Gen. Stat. of Kan. 1909, sec. 5703; Comp. Laws of Okla. 1909, sec. 5648; *Rock Island Lumber & Mfg. Co. v. Fairmount Town Co.*, 51 Kan. 394.

The verified denial of the execution of a written instrument puts the burden on plaintiff of proving the execution. *Montgomery v. K. C. Road*, 34 Kan. 122; *Hayner & Co. v. Eberhardt*, 37 Kan. 308.

¹³ An allegation of authority will be taken as true unless verified denial is filed. Gen. Stat. of Kan. 1909, sec. 5703; Comp. Laws of Okla. 1909, sec. 5648; *Reed v. Sexton's Adm'r*, 20 Kan. 195; *McCabe, etc. Con. Co. v. Wilson*, 17 Okla. 355; *Barnum v. Kennedy*, 21 Kan. 141.

ANSWER.

775. RELEASE.

The defendant, answering, says that the plaintiff executed to him a release (which is filed herewith) whereby he discharged the defendant from the cause of action mentioned in the petition.

Wherefore, etc.¹⁴

776. ANSWER OF ACCORD AND SATISFACTION.

Defendant for answer to the petition of the plaintiff filed herein admits that plaintiff sold and delivered to the defendant the goods, wares and merchandise, as set out in his petition, and that the defendant agreed to pay the sum of dollars for the same; defendant further states that after the sale and delivery of said goods that he endorsed and delivered to the plaintiff the promissory note of X. Y., payable to defendant in the sum of dollars, due on the day of, 19 . . ., and that the plaintiff then and there accepted said promissory note in full satisfaction and discharge of the claim of plaintiff set out in his petition (or complaint) filed herein.

Wherefore having fully answered defendant asks to go hence with his costs.¹⁵

¹⁴ Where in an action for damages a receipt by plaintiff is set up, if the execution thereof is not denied under oath in the reply, the burden is upon the plaintiff to show that it was procured by fraud. *Scandinavian Coal Co. v. Whittaker*, 40 Kan. 123.

¹⁵ Payment to be available as a defense must be pleaded. *Wyman v. Williams*, 52 Neb. 833; *Ashland Land & Live Stock Co. v. May*, 51 Neb. 474; *Culbertson Irrigating & Water Power Co. v. Cox*, 52 Neb. 684; *Mullen v. Morris*, 43 Neb. 596; *Anthony v. Mott*, 10 Kan. App. 105; *Higgins v. Street*, 19 Okla. 42; *Winton v. Myers*, 8 Okla. 421.

The plea of accord and satisfaction to be good must allege an acceptance by the creditor. *Van Housen v. Broehl*, 58 Neb. 348.

The plea is bad when the performance necessary to constitute the satisfaction is not alleged. *Goble v. American Nat. Bank of Kansas City*, 46 Neb. 891.

A general allegation in an answer that the plaintiff's demand has been paid, if not attacked by motion before trial, is sufficient to permit the introduction of evidence to prove payment. *Crilly v. Rugle*, 87 Neb. 367; *Keys v. Fink*, 81 Neb. 571.

An allegation that defendant has paid for all goods "received by him in the transaction described by plaintiff in his petition" amounts to an

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777. ANOTHER ACTION PENDING.

Defendant for answer to the petition of plaintiff filed herein states that at the time of the filing and commencement of this action, that another action between the same parties, and for the same cause of action as alleged in the petition filed herein was pending in the court of the State of and that it has not been dismissed, nor disposed of by said court in any manner and is still pending in said court.

Wherefore defendant prays that plaintiff's petition be dismissed and that the defendant may go hence with his costs.

778. FORMER RECOVERY.

The defendant, answering, says that, at the term of the circuit court for the county of, the plaintiff recovered judgment against the defendant for dollars damages, and dollars for costs; and that said judgment was rendered upon the same cause of action mentioned in plaintiff's petition.

Wherefore, etc.¹⁶

admission of the sale and delivery of goods as alleged in the petition, and a plea of payment. *Ketelman v. Chicago Brush Co.*, 65 Neb. 429.

What constitutes accord and satisfaction. *McKinnon v. Holden*, 85 Neb. 406; *Matheney v. El Dorado*, 82 Kan. 720.

¹⁶ The party must aver in his answer in what court the judgment was rendered, and plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force. *Thomas v. Thomas*, 33 Neb. 373; *Monroe v. Reid*, 46 Neb. 316; *Benz v. Hines*, 3 Kan. 386; *Dixon v. Caster*, 65 Kan. 739.

The defense of *res judicata* is only available as to matters actually in issue and determined in the former suit. *Douglas v. Smith*, 75 Neb. 169; *State ex rel. v. Cornell*, 52 Neb. 25.

Answer setting up defense of *res judicata* held sufficient in *Cowan v. Maxwell*, 27 Okla. 87.

Where certain facts were pleaded as a defense in an action, and a final judgment was rendered therein, necessarily deciding the merits of such defense, the same facts cannot again be the basis of an action between the same parties, arising out of the same transaction, though in the former action the facts were pleaded as a defense only, and no claim was made thereon for affirmative relief. *Bierer v. Fretz*, 37 Kan. 27.

ANSWER.

779. GENERAL DENIAL AND PLEA OF RELEASE IN BANKRUPTCY.

Defendant for answer to the petition (or complaint) of the plaintiff filed herein, denies each and every allegation therein contained.

Further answering said petition (or complaint) of the plaintiff defendant states that on the day of, 19.., a decree of discharge from all his debts in bankruptcy was made by the United States District Court of the District of; that a copy of the decree of discharge is herewith filed and made a part of this answer.

Wherefore, etc.

780. ANSWER PLEADING TENDER BEFORE SUIT.

Defendant for answer to the petition (or complaint) of plaintiff, filed herein, states that on the day of, 19.., before the said cause of action was commenced by the plaintiff, he tendered to the plaintiff dollars, in legal tender of the United States in payment of the alleged claim (note, agreement or indebtedness) set forth in the petition (or complaint) of the plaintiff.

Defendant states that he is now and always has been ready and willing to pay said claim of the plaintiff and that he now pays into this court the sum of dollars in payment thereof.

Wherefore defendant prays to be dismissed with his costs in this proceeding.¹⁷

781. ANSWER MAKING TENDER AFTER SUIT COMMENCED.

Defendant for answer to the petition of the plaintiff filed herein states that there is due plaintiff from defendant the sum of dollars and that defendant is willing to pay said amount to plaintiff and now pays the sum into this court, together with the costs that have accrued to this day (then set out any other facts necessary to complete the answer).

Wherefore, etc.

¹⁷ Sufficient allegation of tender. Diebold Safe and Lock Co. v. Holt, 4 Okla. 479.

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782. OFFER BY DEFENDANT TO COMPROMISE.

To C. D., plaintiff herein:

Defendant states that he is willing to allow judgment to be taken against him in the above entitled cause for the sum of dollars.

783. ANOTHER FORM—WHERE RIGHT TO POSSESSION OF PERSONAL PROPERTY IS IN DISPUTE.

To C. D., plaintiff herein:

Defendant states that he is willing and offers to allow judgment to be entered against him in the above entitled cause as follows:

That the plaintiff be given the possession of the following property (describe the property which defendant offers to allow plaintiff to take).

784. PLAINTIFF'S ACCEPTANCE OF OFFER OF COMPROMISE.

To E. F., defendant herein:

Plaintiff states that the offer of defendant C. D. in the above entitled cause, to allow judgment to be entered against him in the sum of dollars, which offer was served upon plaintiff on the day of, 19.., will be accepted by the plaintiff and is by this writing accepted by the plaintiff and judgment in said cause will be asked for the amount specified in said offer.

785. OFFER TO LIQUIDATE DAMAGES.

To C. D., plaintiff herein:

You are hereby notified that if I fail in my defense in the above entitled cause of action wherein you claim damages and the court or jury shall find that you are entitled to damages in said cause, then the damages in said action may be assessed at the sum of dollars.

786. ACCEPTANCE OF OFFER TO LIQUIDATE DAMAGES.

To E. F., defendant herein:

You are hereby notified that your offer, served upon me under date of day of, 19.., in which you offer to allow the damages in the above entitled cause to be as-

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sessed at the sum of dollars is hereby accepted and you are further notified that if you fail in establishing your defense to said action that I shall ask for judgment to be entered against you in the sum of dollars, the amount specified in your offer.

787. COMMENCEMENT OF ANSWER TO SUPPLEMENTAL PETITION.

Now comes said defendant, W. Z., and for his answer to the plaintiff's petition and to the amendment and supplemental petition herein filed: (set out facts of answer).¹⁸

¹⁸ From form in Sampson v. Zimmerman, 73 Kan. 654.

ANSWERS IN PARTICULAR ACTIONS ALPHABETICALLY CLASSIFIED.

CHAPTER LXVI.

ACCOUNT.

- 787. General denial and plea of accord and satisfaction.
- 788. Answer setting up breach of warranty.
- 789. Answer setting up special defense of violation of ordinance providing for license tax and defense of violation of state statute relating to trusts.

787. GENERAL DENIAL AND PLEA OF ACCORD AND SATISFACTION.

Defendant for answer to the petition of plaintiff filed herein denies each and every allegation therein contained.

For further answer defendant states that on the day of, 19.., he assigned to the plaintiff a policy of insurance which the plaintiff received in full satisfaction and payment of said demand against defendant.

Wherefore, etc.¹

¹ **Verified denial.** The correctness of any account duly verified by affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney. Civil Code of Kan. sec. 110; Gen. Stat. Kan. 1909, sec. 5703; Comp. Laws of Okla. 1909, sec. 5648; Gray v. Bryant, 46 Kan. 43.

Where there is no allegation in a pleading of the correctness of a verified account attached thereto, there can be no denial thereof, and the amount is at issue under the general denial. Haldeman v. Johnson, 8 Kan. App. 473.

An answer which does not question the correctness of a verified account as set forth in the petition, but which sets up an affirmative defense is not required to be verified. It is only the correctness of a duly verified account that an unverified answer admits. Sawyer, etc. Lumber Co. v. Champlain Lumber Co., 16 Okla. 90.

The fact that a verified account sued on and set out in the petition is not denied by a verified affidavit of the defendant does not preclude the latter from interposing any defense pleaded in the answer which does not

788. ANSWER SETTING UP BREACH OF WARRANTY.

Comes now the defendant herein and for answer to plaintiff's petition admits that the plaintiff is a corporation duly organized under the laws of the State of; admits that the defendant is a corporation organized under the laws of the State of Nebraska and doing a general merchandise business at W. W., Nebraska.

involve a denial of the reasonableness of the amounts charged in the verified account, or the correctness of the items. In such case, it may be shown in defense of the action that the plaintiff agreed to charge nothing for items of work done set out in the verified account or that the account has been paid. *Lucas v. Board of County Commissioners of Ford County*, 67 Kan. 418.

Where a petition, in an action on an account, is verified, and the defendant does not seek to deny the correctness of the account stated, but alleges in his answer that the account was not due when the suit was brought, it is not error for the court to permit the defendant to introduce evidence to show that the suit was prematurely brought, though the answer was not properly verified, or was not verified at all. *Johnston v. Johnson*, 44 Kan. 666.

The affidavit denying the correctness of an account, verified as required by statute, which is made by agent or attorney, must set forth the reasons why it is not made by the party himself, and if it fails to set forth such reasons it is insufficient under the law to question the correctness of the account. *County Comm'rs v. Isenberg*, 10 Okla. 378.

Consistent defenses. An answer in an action on an account for services which contains a general denial of the essential facts of the petition and avers that the charges in the itemized account are unreasonable and unjust does not present inconsistent defenses. *Cate v. Hutchinson*, 58 Neb. 232.

In an action for the price of goods a defense that defendant was fraudulently induced to sign what purported to be a contract of sale, prepared by the plaintiff, on the false representations of plaintiff that it contained the stipulations previously agreed upon, to the effect that the goods were placed in defendant's hands for sale on commission and were not purchased by him, is not inconsistent with the defense that the goods delivered to defendant were not of the quality stipulated in the writing, and defendant cannot be compelled to elect between them. *Disney v. St. Louis Jewelry Co.*, 76 Kan. 145.

Where an action is brought on an account assigned to plaintiff in writing, and the execution of the assignment is admitted by the pleadings, it is not error for the court to refuse to permit the defendant to introduce evidence tending to show that such assignment is only colorable and that the plaintiff is not the real party in interest, no such defense being pleaded. *Lesh v. Meyer*, 63 Kan. 524.

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2. Defendant admits that on or about the day of, 19.., the defendant purchased of and from the plaintiff a bill of goods, to-wit, flour; that the said flour was sold to defendant by plaintiff, the price of which was dollars. But at the time of said sale and before the same was consummated the plaintiff, by its agent, stated and represented and warranted to the defendant that the aforesaid flour was first-class and equal to the brand of flour which defendant was selling at that time, and which said brand of flour was first class. That defendant, relying on the aforesaid statements and representation so made by plaintiff, purchased the aforesaid flour, and agreed to pay the sum of dollars therefor in case flour was as represented; and by reason of the aforesaid warranty of plaintiff, defendant was induced to accept said flour, and place it upon the market, and to retail the same to its customers.

3. That the aforesaid representations made by plaintiff as to the quality of the said flour purchased were not true, but that said flour was of an inferior grade or quality and of entirely different quality from that which defendant agreed to purchase from plaintiff, and of but little value, and which plaintiff agreed to furnish defendant, and that said flour purchased from plaintiff was wholly unfit for use.

4. That it notified plaintiff that said flour was not flour as plaintiff represented it to be, and returned the same to plaintiff, whereupon the plaintiff represented to defendant that it had changed said flour for a better quality, and returned to defendant; but defendant represents the fact to be that plaintiff did not change all of said flour, whereupon defendant returned said flour to plaintiff.

5. That at the time of the purchase of said flour from plaintiff it had a large and valuable trade in flour and had the confidence of all its customers in that line of trade, but that by reason of the bad quality of the flour purchased from the plaintiff, and believing the representations of plaintiff to be true, and having sold some of said flour and recommended it to be as good quality as the brand of flour which it had been selling heretofore, defendant lost its retail flour

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trade, to the very great damage of defendant in the sum of dollars.

6. Defendant further represents that plaintiff is indebted to the defendant in the sum of dollars, money paid out for use and benefit of plaintiff by defendant in connection with the transaction aforesaid.

7. Defendant denies each and every allegation in plaintiff's petition contained not herein specifically admitted.

Wherefore, by reason of the breach of warranty of plaintiff of the flour aforesaid, and the misrepresentation and fraud of plaintiff, the defendant has been damaged in the amount of dollars; and plaintiff is indebted to the defendant for money paid out for plaintiff in the sum of dollars. Defendant therefore prays judgment for dollars and the costs of this suit.²

789. ANSWER SETTING UP SPECIAL DEFENSE OF VIOLATION OF ORDINANCE PROVIDING FOR LICENSE TAX AND DEFENSE OF VIOLATION OF STATE STATUTE RELATING TO TRUSTS.

1. The defendant, for answer to the petition of the plaintiff, denies the truth of each and every allegation in the plaintiff's petition contained.

2. The defendant denies the truth of the allegation in the plaintiff's petition contained that the account annexed to said petition is correct; and said defendant avers that said account is not true or correct, and denies the truth and correctness of the same.

3. The defendant, for a further answer and defense, alleges that at all times in the plaintiff's petition mentioned there was and now is in force in the city of K. C., Kansas, an ordinance duly enacted by the city of K. C., known as Ordinance No. 4760 of the city of K. C., Kansas, entitled "An Ordinance levying a license tax upon and regulating the callings, trades, professions and occupations therein specified and providing for the collection of such tax, "first published , 19.., a copy of which ordinance is here to annexed and made a part hereof, marked "exhibit A." "

² Form in Reed Bros. & Co. v. Davis Milling Co., 37 Neb. 391.

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The defendant alleges that the plaintiff was at all times in his petition mentioned engaged in the business of selling coal, and was a dealer or jobber in coal; and that the plaintiff carried on said business in the city of K. C., W. county, Kansas, and that all the transactions in the plaintiff's petition mentioned and all the coal alleged in plaintiff's said petition and the account thereto annexed which was at any time sold or delivered to the defendant was sold and delivered to said defendant in the city of K. C., Kansas, and that notwithstanding the fact that said plaintiff was a dealer and jobber in coal and engaged in said business in the city of K. C., Kansas, at all times in the plaintiff's petition mentioned, said plaintiff did not take out, procure or have at any time any license from the city of K. C., Kansas, to engage in any business in said city, and did not pay to said city any occupation tax to engage in any business in said city, and did unlawfully engage in the business and transactions aforesaid, in the city of K. C., Kansas.

4. The defendant, as a further defense, alleges that at all times in the plaintiff's petition mentioned and at the time of the occurrence of all the transactions in the plaintiff's petition mentioned, and ever since said time, the plaintiff was and had been a member of a trust organized and maintained by certain persons, firms and corporations for the purpose of creating and carrying out restrictions in trade upon persons engaged in the business of mining, buying and selling coal and upon the full and free pursuit of said business, and each part and branch thereof.

That said trust was further organized and maintained at *all* times in the plaintiff's petition mentioned for the purpose of increasing and controlling the price of coal to retail coal dealers.

That said trust was further organized and maintained at *all* times in plaintiff's petition mentioned for the purpose of preventing competition in the sale, purchase and transportation of coal.

That said trust was further organized and maintained at the time of the occurrence of all the transactions in the

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plaintiff's petition mentioned and ever since said time, for the purpose of fixing, establishing and controlling the prices for sale of coal to retail dealers therein and to the public generally.

That said trust was further organized and maintained for the purpose of making, entering into, and carrying out contracts and agreements, binding the members thereof not to sell coal below a common standard price and by which agreements the members of said trust further agreed to keep the price of coal at a fixed or graded figure, and to establish and settle the prices between themselves for the transportation, sale and production of coal, and by which agreement the members of said trust further agreed to combine and unite their various interests in connection with the mining, production and sale of coal.

The defendant further alleges that at all times in the plaintiff's petition mentioned, and at the time of the occurrence of the various transactions mentioned in plaintiff's said petition and the accounts thereto annexed, and ever since said time said trust has been continuously engaged in carrying on, doing and performing the acts and things aforesaid, and the said acts and things for which said trust was organized as hereinbefore set forth.

The defendant further alleges that at all times in the plaintiff's petition mentioned and at the time of the various transactions referred to in the plaintiff's petition and the account annexed thereto, the defendant was engaged in business as a retail coal dealer or merchant and had and maintained a coal yard for the sale of coal to the public generally at and within the city of K. C. in W. county, Kansas, and that the defendant conducted and carried on his business as a retail coal dealer and merchant in said city of K. C.

The defendant further alleges that all of the transactions referred to in plaintiff's petition were had in K. C., Kansas, and that all coal at any time sold and delivered to the defendant by the plaintiff, was sold and delivered to the plaintiff in K. C., Kansas, and that all of the transactions

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of the plaintiff with the defendant referred to in the plaintiff's petition were had and done in the State of Kansas.

The defendant alleges that all the transactions referred to in the plaintiff's petition which the defendant had with the plaintiff in regard to the sale or purchase of coal at any time and the account sued upon by the plaintiff, grows out of transactions had in violation of the provisions of chapter 265 of the Laws of Kansas, 1897.

Defendant alleges that plaintiff is now and had within one year next preceding the date of the commencement of this action, been guilty as a principal, directly and indirectly, of a violation of each and all of the provisions of chapter 265 of the Laws of Kansas, 1897, entitled "An act defining and prohibiting trusts, providing procedure to enforce the provisions of this act, and providing penalties for the violation of the provisions of this act," published March 12, 1897.

5. The defendant, for a further defense and counterclaim, alleges the truth of all the matters hereinbefore set forth in this answer and makes the same a part of his cause of action as though here set forth at length, and further avers that he was and is damaged, by reason of the organization, maintenance, acts and conduct of said trust of which the plaintiff was a member, and particularly by said trust increasing the price of coal and preventing the defendant from obtaining coal with which to supply his customers and carry on his business, and by interfering with the defendant in the conduct, management and carrying on of his said business in the total sum of dollars, for which sum the defendant prays judgment against the plaintiff.

Wherefore, the defendant prays that the plaintiff recover nothing on account of the matters alleged in his said petition, and that the defendant have and recover a judgment for dollars against the plaintiff, and his costs.³

³ From form in record in *Mayer v. Hartman*, 77 Kan. 788.

CHAPTER LXVII.

ACCOUNT STATED.

790. Answer denying that an account was stated and setting up a claim for money due defendant.

790. ANSWER DENYING THAT AN ACCOUNT WAS STATED AND SETTING UP A CLAIM FOR MONEY DUE DEFENDANT.

And now comes the defendant and answers plaintiff's petition and alleges and shows:

I. This defendant denies each and every fact and averment in plaintiff's petition contained except such and so far as the same is hereinafter expressly admitted or alleged to be true.

II. Defendant denies that there was any account stated between plaintiffs and defendant and denies that the defendant ever admitted the sum of dollars, or any other sum to be due from defendant to plaintiffs.

III. Defendant admits that he did business with the plaintiffs, as a bank, that he deposited money and commercial paper with said bank, that in truth and in fact the plaintiffs are indebted to this defendant in a large sum of money, to-wit: dollars. That "exhibit A," hereto annexed and made a part of this answer, shows that the total amount of money, drafts, notes and accounts deposited and paid over by this defendant to said plaintiffs from about 19.., to 19.., amounts to the sum of \$..... That this defendant has received from said plaintiffs at divers times during said time divers sums of money amounting in the aggregate to the sum of \$....., and that there is still justly due owing and unpaid to this defendant by said plaintiffs after all credits which plaintiffs are entitled to recover the sum of \$..... which remains wholly due and unpaid.

Wherefore defendant demands judgment against said plaintiffs for said sum of \$..... besides the costs of this action.¹

¹ Adapted from form in record in McKinster v. Hitchcock, 19 Neb. 100.

CHAPTER LXVIII.

ASSAULT AND BATTERY.

791. Answer setting up self-defense, and general denial.
792. Answer in an action by passenger for ejection from street car for alleged offer of counterfeit money for fare.
793. Answer setting up self-defense.

791. ANSWER SETTING UP SELF-DEFENSE, AND GENERAL DENIAL.

The defendant for answer to the petition of the plaintiff filed herein, alleges:

1. That the said day of, 19.., mentioned in the petition, was the day of the general election held in the State of Nebraska. That the village of E. C., where both plaintiff and defendant resided, was one of the polling places of said election.. That at said election in said village there was certain opposition made at the polls against the local candidate for county supervisor, which said opposition angered, provoked, and incensed the plaintiff to such an extent that he profanely declared his ability and intention to whip, thrash and lick any and all persons who participated or were participating in said opposition. That said plaintiff, who is a large, strong and muscular man and a common brawler and a bully, on said day started out to execute his threats as aforesaid, and in pursuance thereto, accosted the defendant, who was of the opposition as aforesaid, and declared his ability and intention to then and there whip him, the defendant. That the defendant had no choice left in the matter but to defend himself, whereupon the plaintiff and defendant had a fist fight.

That in said altercation the defendant used no more force than was reasonably necessary to protect himself against said assault.

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2. The defendant, further answering said petition, denies each and every allegation therein contained, not hereinbefore expressly admitted.¹

792. ANSWER IN AN ACTION BY PASSENGER FOR EJECTION FROM STREET CAR FOR ALLEGED OFFER OF COUNTERFEIT MONEY FOR FARE.

And for further answer and defense, defendant says that said plaintiff tendered in payment of his fare what purported to be a one-dollar bill, and the conductor, believing said bill to be counterfeit and spurious, refused to take the same, and in good faith demanded of plaintiff payment of his fare in other money, which said plaintiff then and there refused to pay, and said defendant's conductor then and there demanded that said plaintiff should quit the car, which said plaintiff then and there refused to do, and required and compelled said conductor, for the sole purpose of laying a seeming foundation for this suit, to make a show of force in putting said plaintiff off said car, which said conductor then and there did, using, however, no unnecessary force and doing no injury to the plaintiff whatever.

793. ANSWER SETTING UP SELF-DEFENSE.

The defendant, for answer to the petition of plaintiff, states that on the date named in plaintiff's petition the plaintiff violently assaulted the defendant, and the defendant to defend himself from said assault and to protect his person did assault, beat and bruise the plaintiff, using no more force than was necessary for the protection of defendant.

Wherefore defendant prays to be dismissed with his costs for answering.

¹ From form in record in *Morris v. Miller*, 83 Neb. 218.

In a civil suit for assault and battery, where the answer is a general denial, evidence of justification is inadmissible. *Barr v. Post*, 56 Neb. 698.

In an action for damages for an assault and battery brought by a married woman in her own name an answer setting up that the plaintiff is a married woman presents no defense to the action. *Townsdin v. Nutt*, 19 Kan. 282.

CHAPTER LXIX.

BANKS AND BANKING.

794. Answer to action by administrator of the deceased, setting up payment to the widow and children.

794. ANSWER TO ACTION BY ADMINISTRATOR OF THE DECEASED, SETTING UP PAYMENT TO THE WIDOW AND CHILDREN.

1. That it denies each and every allegation in said petition contained, except such as are hereinafter admitted.

2. Further answering, said defendant says that it admits it is a corporation, and admits the decease of C. W. aforesaid, and admits there was money deposited in said bank, but which did not belong to the deceased, and that said widow and children drew the money out of the bank, upon the execution of a requisite bond by them therefor.

3. Defendant further alleges that the widow and children of the said deceased, to-wit, Mrs. —. W., widow; H. R. W., H. W. and C. W., were the sole and only persons who owned the money, and who had the right to draw the same from said bank, and that the said agent, who it is alleged in plaintiff's petition drew said money, was duly authorized and empowered to draw such money. At the time that they so drew the money from the bank no executor or administrator had been appointed; wherefore they had the lawful right to draw said money. Defendant further alleges, that said money was exempt from appropriation to the payment of any of the debts of the said C. W., deceased.¹

¹ Form in Wichita National Bank v. Maltby, 53 Kan. 567, 568.

In an action against a bank for money deposited by the plaintiff's agent to his own account, evidence of payment by the defendant on checks subsequently drawn by such agent, in good faith, relying upon his apparent title to said fund, is inadmissible under a general denial. Such fact to be available as a defense must be specially pleaded. Cady v. South Omaha Nat. Bank, 46 Neb. 756.

CHAPTER LXX.

BILLS AND NOTES.

- 795. Answer denying execution of the note.
- 796. Same—Another form.
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- 798. Answer denying execution of notes by corporation and verification.
- 799. Answer by one partner denying that note sued upon was executed for the benefit of the partnership.
- 800. Answer denying that the plaintiff is a bona fide holder or owner of the note.
- 801. Allegations of want of consideration.
- 802. Answer setting up want of consideration and usury.
- 803. Answer setting up defense of usury.
- 804. Answer setting up delivery of note on condition, also want of consideration.
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- 807. Answer alleging that the contract for which the note was given was a wagering contract and that the note was given for a loss in trading in options.
- 808. Answer pleading payment.
- 809. Answer to action on a note alleging accord and satisfaction.
- 810. Answer setting up alteration of note after its execution.
- 811. Answer alleging that note was given for land which plaintiff was holding in excess of amount allowed him.
- 812. Answer of married woman averring that she did not sign with intention to charge separate estate, and that she has no separate estate.

795. ANSWER DENYING EXECUTION OF THE NOTE.

Now comes the defendant in the above entitled cause and for answer to plaintiff's petition filed herein denies that he made, executed or delivered the note referred to in said petition.

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Wherefore having fully answered defendant prays to be dismissed with his costs in this proceeding.

A. C.

A. C. being duly sworn on his oath states that the facts set out in the above answer are true.

A. C.

Subscribed and sworn to, etc.¹

796. SAME—ANOTHER FORM.

Now comes the defendant, J. W. W., and for his answer says that he never executed the note described in plaintiff's petition, and never authorized any person to sign said note, and never delivered such a note to I. B. C., or any other person or corporation whatsoever.

Affidavit.²

797. GENERAL DENIAL IN ACTION ON NOTE.

Comes now the said defendant, H. K., and for his answer to the plaintiff's petition herein denies each and every allegation therein contained.

State of }
County of } ss.

H. K., of lawful age and being first duly sworn, deposes and says: That he is acquainted with the facts set forth

¹ **Verified denial.** In order to put in issue execution of the note and the endorsement thereon a denial must be verified by the affidavit of the party, his agent or attorney. Gen. Stat. of Kan. 1909, sec. 5703; Comp. Laws of Okla. 1909, sec. 5648; Cob. Ann. Stat. of Neb. 1911, sec. 1115.

Failure to deny execution of, under oath is admission of execution. Hardwick v. Atkinson, 8 Okla. 608; Gaylord v. Stebbins, 4 Kan. 35.

A verified denial of the execution of a promissory note is sufficient to put in issue the execution as well as alterations of indorsements of credits written on the back of the note contemporaneously with its execution and before its delivery. Kurth v. Farmers and Merchants State Bank, 77 Kan. 475.

Execution and indorsement thereon of a note is admitted where there is no verified denial. Commonwealth Nat. Bank of Dalls v. Baughman, 27 Okla. 175.

² Adapted from form in Capital National Bank v. Williams, 35 Neb. 410.

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in the above and foregoing answer, and that the facts therein stated are true. So help me God.

H. K.

Subscribed and sworn to, etc.³

798. ANSWER DENYING EXECUTION OF NOTES BY CORPORATION AND VERIFICATION.

For a second and further answer and defense herein, said defendant states that said T. C. Co. was incorporated under the laws of Kansas on the day of, 19.., and that said company has had, at all times, a board of six directors, and that none of the alleged notes which purport to be set out in counts one, two, three, four, five, six, seven, eight and nine of plaintiff's petition were ever authorized by the board of directors of said company, nor by a majority of said directors, and that defendant is not indebted to plaintiff on account thereof in any sum whatever.

³ This answer to a petition on three promissory notes, which alleged that they were executed and delivered by the defendant does not put in issue the execution of the notes sued upon. *Kimble v. Bunny*, 61 Kan. 665.

Under an unverified general denial of all the allegations of plaintiff's petition, in an action by an indorsee against an indorser, the execution of the note and indorsement thereon will be taken as admitted. *Grimes v. Tait*, 21 Okla. 361.

The denial by defendant of the place of execution and delivery of a note in the language of the petition, is a negative pregnant and admits the execution of the note. *Spencer v. Turney & Co.*, 5 Okla. 683.

An unverified denial may, under certain circumstances, put in issue the title of ownership of the note. *Farm Land Mortgage and Deben-ture Co. v. Elsbree*, 55 Kan. 562.

The denial by defendant that he is indebted to plaintiffs in any sum whatever sets up no defense to a suit upon a promissory note. *Spencer v. Turney & Co.*, 5 Okla. 683.

Material alteration of the note may be shown under a general denial. *Walton Plow Co. v. Campbell*, 35 Neb. 173; *Case Threshing Machine Co. v. Peterson*, 51 Kan. 713.

General denial puts in issue plaintiff's right and title, acquired by assignment where it is not alleged that the assignment was in writing. *Pattie v. Wilson*, 25 Kan. 227; *Wichita National Bank v. Maltby*, 53 Kan. 567.

An allegation that "he is the owner and holder of said promissory note as receiver" is put in issue by an answer not verified by affidavit. *Doughty v. Funk*, 24 Okla. 312.

Verification.

I, T. W. H., being duly sworn, say that I am the attorney for the defendant, T. C. Co.; that said defendant is a corporation organized under the laws of the State of Kansas; that I have been attorney for said defendant ever since its organization, and have been one of the directors of said T. C. Co. ever since its organization, and am familiar with the records of said defendant; that I have read the second division of the answer filed by said defendant herein, and know the contents thereof, and that I believe the facts stated therein to be true; that said T. C. Co. has at all times had a board of six directors, and that none of the notes set out in plaintiff's petition was ever authorized by said board of directors, nor by a majority of them, nor by a majority of a quorum of said directors.⁴

790. ANSWER BY ONE PARTNER DENYING THAT NOTE SUED UPON WAS EXECUTED FOR THE BENEFIT OF THE PARTNERSHIP.

And by way of first defense herein, this answering defendant avers that at the date mentioned in plaintiff's petition, upon which date plaintiff claims the said note was executed, this answering defendant, together with defendant F. H., were a copartnership duly organized and formed under the laws of the State of Nebraska, having their principal place of business in the city of, Nebraska, and were at the time carrying on their partnership business. That said partnership was formed for the sole purpose of carrying on the general business of wholesale and retail dealers in stoves, farm implements, hardware, and other goods of a like character, and for no other purpose whatsoever; and that neither of the partners, by terms of the said partner-

⁴ Form in *Topeka Capital Co. v. Remington Paper Co.*, 61 Kan. 6, 8; this answer was held a sufficient denial of the execution of the notes and of the authority of the agent assuming to execute them for the corporation, and that it cast the burden of proof of execution and the authority of the agent on the plaintiff.

Form of answer alleging the signing of the note, not as an individual, but as secretary of a corporation. *Janes v. Citizens Bank*, 9 Okla. 546, 549.

ship agreement, had the power or right to pledge the credit of the said partnership for any other purpose than that of carrying on its said business as aforesaid; and that the signing of notes by the said partnership for purposes other than the purchase of goods necessary and usual for the carrying on of their said business, as hereinbefore set out, was expressly prohibited by the terms of the partnership agreement; and that neither the said copartnership nor this answering defendant at any time received any benefit from, or consideration for, the said pretended signature to the said pretended note set out in plaintiff's petition; and that the said pretended note, and the pretended signature of H. & P., thereto, was not made for the purpose of carrying on the mercantile business of the said H. & P., and that no person whomsoever had any authority whatsoever to sign the said name of H. & P. to the said pretended note, and of all of which said matters and facts the said plaintiff had full and complete notice at the time of the delivery to him of the note set out in his petition.

By way of further defense this answering defendant avers that at the time of the pretended execution of the pretended note set out in plaintiff's petition, he was, and for a long time past had been, a resident of the State of, of all of which matters and facts the plaintiff at the time of the delivery to him of the said pretended note well knew; and that he never heard of the pretended execution of the said pretended note until after this action was brought, and at no time between the time the said pretended note set out in plaintiff's petition became due, until after the beginning of this action upon the said pretended note, did this answering defendant have any knowledge or notice whatsoever of the existence of any such pretended note.⁵

800. ANSWER DENYING THAT THE PLAINTIFF IS A BONA FIDE HOLDER OR OWNER OF THE NOTE.

That he admits that on the day of, 19... he made and delivered the promissory note set forth in

⁵ Form in *Peck v. Tingley*, 53 Neb. 171.

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plaintiff's petition, but he denies that on or about the day of, 19.., or at any other time before or subsequent to the maturity of said note, the said H. W. P. transferred, indorsed, or delivered said promissory note to the plaintiff, and avers that the same was not indorsed by the said H. W. P., and that the plaintiff is not the holder or owner of the same, and that the said H. W. P. is the real party in interest in this suit, and the defendant further denies each and every other allegation in said petition contained.⁶

301. ALLEGATIONS OF WANT OF CONSIDERATION.

And defendant further says that on the day of, 19.., the V. B. and S. I. held a note of defendant and one J. G. for the sum of dollars, which said note was then and for a long time had been due and unpaid; that said defendant Z. G. was surety on said note; that he never received or had any of the consideration for which the same was made; that thereupon this defendant and the said V. B. and S. I. entered into an agreement in substance as follows, to-wit: It was agreed that the V. B. and S. I. would assign the note held by it as aforesaid to the defendant, and that said defendant should then permit the said V. B. and S. I. to bring suit thereon in the name of said defendant against said J. G., and in his name to prosecute the same to judgment, and in the name of this defendant to prosecute any other suit necessary and advisable to be instituted and conducted until the said judgment should be finally collected; and that upon the collection of the same, that this defendant would pay over to the said V. B. and S. I. any and all moneys that might come into his hands by reason of such suit, and return and transfer said promissory note back to said bank; and that said defendant would make, execute, and deliver to said V. B. and S. I. the note sued on herein to be held by said bank as security for the faithful performance of the contract aforesaid on the part of this defendant; and defendant avers

⁶ Form in Colby v. Parker, 34 Neb. 510.

that all the conditions to be by him performed in said contract have been by him performed in good faith, and said promissory note has been sued on herein as was agreed as aforesaid, and has been prosecuted to judgment; but said judgment has never been collected, and defendant now is willing, and always has been willing, to assign the said judgment, and the said promissory note to said bank, or any person that it may direct, and now here offers so to do; and that said promissory note sued on herein was made in pursuance of said contract; and that defendant never at any time received any consideration therefor whatever; and defendant further avers that said V. B. and S. I. then and there undertook, promised, and agreed with the defendant that said note should never be collected from defendant if he (defendant) would faithfully comply with said contract aforesaid, and that the same should not at any time be assigned or transferred; and defendant further avers that, at the time of the making of said contract between said defendant and said V. B. and S. I. as aforesaid, the said plaintiff J. P. B. was a stockholder in said bank, and one of the directors thereof, and had actual notice and knowledge of the facts above stated, and all of them.⁷

802. ANSWER SETTING UP WANT OF CONSIDERATION AND USURY.

1. That they deny each and every allegation, statement and averment in said petition contained, not hereinafter expressly admitted.

2. Said defendants admit that they executed the four notes or bonds, copies of which are attached to and made part of the petition herein; that it is a religious corporation duly organized under the laws of the State of Kansas, and

⁷ Form in *Barnes v. Gragg*, 28 Kan. 36.

Want of consideration is new matter which must be specially pleaded, and is not available as a defense under a general denial. *Sharpless v. Giffen*, 47 Neb. 146.

An answer which does not in specific terms allege that the time of payment in a promissory note was by payee extended for a valuable consideration is insufficient and on motion may be stricken out. *Keokuk Falls Improvement Co. v. Kingsland Mfg. Co.*, 5 Okla. 32.

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that said K. T. and B. Company is duly incorporated under the laws of Kansas.

3. The said defendants allege that while they made and executed their notes to said T. K. T. and B. Co. for the aggregate sum of dollars, yet they received of said loan only the sum of dollars, being dollars less than they should have received, the said defendant never receiving from said T. K. T. and B. Co., or from the plaintiff any valid and sufficient consideration for said sum of dollars, whereby there was a failure of consideration in the giving of said notes.

4. Said defendants for a further defense allege that they have paid to the said T. K. T. and B. Co., and to the plaintiff, up to , 19.., on account of the money so as aforesaid received, the full sum of dollars, which is in full payment of the principal sum actually received from said T. K. T. and N. Co., and interest thereon as per contract.

5. The said defendants further allege that the said plaintiff ought not to have his said action against them because they say that said notes were given by said defendants to the said T. K. T. and B. Co. for the loan of dollars, and no more, and that said sum of \$...... was for commission and interest for years at the rate of per cent. per annum.

Wherefore said defendants pray judgment that they may go hence without day, and have judgment for their costs herein laid out and expended.*

803. ANSWER SETTING UP DEFENSE OF USURY.

The defendant further avers that the promissory note mentioned in the second defense herein, as having been given by this defendant and one J. G. to the V. B. and S. I., for the sum of dollars, was wholly for usurious interest, that accrued to said V. B. and S. I. upon loans of money made by said V. B. and S. I. to one J. G., and for which loans this defendant became and was security; that there

* Form in *Frazier v. Ebenezer Baptist Church*, 60 Kan. 404, 405.

was no other consideration ever received by defendant J. G., or any other person, for said note.⁹

804. ANSWER SETTING UP DELIVERY OF NOTE ON CONDITION, ALSO WANT OF CONSIDERATION.

Comes now the defendants and for a first ground of defense to the petition state, that at the time of the making

⁹ Form in *Barnes v. Gragg*, 28 Kan. 36.

Plea of usury. To constitute there must be a statement of the contract claimed to be usurious, with whom it was made, its terms and character, and the amount of interest agreed upon to be reserved, taken, or received. *Bell v. Stowe*, 44 Neb. 210; *New England Mortgage Security Co. v. Sandford*, 16 Neb. 689; *Ætna Building and Loan Assn. v. Randal*, 23 Okla. 45.

The plea of usury is a personal privilege, and can only be pleaded by the debtor. *Pritchett v. Mitchell*, 17 Kan. 355.

To avail himself of the usury laws of another state, one must plead and prove the laws of such state; and in the absence of such pleading and proof the court will presume the laws of such state are the same as the laws of the state where action is pending. *Betz v. Wilson*, 17 Okla. 383.

Usury, extension of time to the principal whereby the surety is discharged, and payment are not inconsistent defenses in an answer of a surety on a promissory note. *Shed v. Augustine*, 14 Kan. 219.

Form of answer setting up the defense of usury. *Lincoln Nat'l Bank v. Davis*, 25 Neb. 376.

Form of answer alleging illegality and fraud in the inception of the note. *Kennedy v. Gibson*, 68 Kan. 612.

An answer alleging illegality and fraud in the inception of a note sets up a defense which requires the holder to show that he or some antecedent holder took the note before maturity in good faith for value and in the usual course of business. *Kennedy v. Gibson*, 68 Kan. 612.

The maker of a non-negotiable note may set up and prove as a defense thereto that such note was given for land, the sale of which was brought about by the fraudulent misrepresentations of the payee of the note; and whatever damage he shows that he has suffered by reason of such fraudulent misrepresentations will be a defense to so much of the note. *Graham v. Wilson*, 6 Kan. 295.

An answer which admits the execution of a subscription note sued upon, but alleges that the person procuring the note had misrepresented the conditions of the same and the extent of the liability that the defendant would incur in signing the same, where the note is in plain language and unambiguous in its terms, is insufficient to constitute a defense where it is not alleged that the signer of the note or written

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of the note sued on, the C. B., plaintiff, held the note made to it by J. A. K. for the sum of dollars; that the said note was an excessive loan according to the laws of the State of Oklahoma in consideration of the amount of capital stock of said bank, and that in May preceding the said date, the said W. E. L. had been one of the stockholders of said bank, and had sold his stock to some other persons, and that on the day of the making of said note it was agreed by the said L., the said C. B. and the said defendants J. E. G. and W. O. J., that if the said defendants would make and deliver their note for the sum of dollars to the said L. that he would deliver the same to the C. B., plaintiff, and that he, said L., and the said plaintiff would transfer to the said W. O. J., the said note of J. A. K., allowing him to collect the same and apply the collection of the same to the payment of the said note for dollars to be made by these defendants; that the transfer of the said K. note was to be a condition precedent to the delivery of the said note of these defendants to said L. and the acquisition thereof by the plaintiff, and that as to this agreement plaintiff was fully informed and well knew that in pursuance thereof these defendants, on the date which it bears, made, executed and delivered their note, the original of "exhibit A" to the said W. E. L., conditioned solely upon the agreement aforesaid, to-wit: that the said L. should transfer the same to the C. B., and that previous thereto the said C. B. should transfer the said note made by J. A. K. to defendant, W. O. J., for collection and application upon the payment upon the note herein sued upon, and that this the plaintiff was thoroughly informed of and well knew; that in violation of said agreement the said K. note has never been delivered to the said W. O. J. and the plaintiff, though often requested to do so, has failed and

instrument is unable to read. Guthrie & Western R. R. Co. v. Rhodes, 19 Okla. 21.

Illegal sale. The defense that the consideration for the note was an illegal sale of intoxicating liquors made by the payee to the maker is an affirmative defense, and cannot be proved under a general denial. Dillon v. Darst, 48 Neb. 803.

refused to deliver the same; that at the time of the making of the original of "exhibit A" said J. A. K. had valuable property in the State of, the exact location of which is to these defendants unknown, which he had promised and intended and would have mortgaged to the said W. O. J. if the said note made by J. A. K. had been delivered to him, W. O. J., as agreed upon, and that the said property was fully worth and sufficient to secure the said note and would more than pay the note herein sued on. That since the making of said note and since the refusal of plaintiff to deliver the K. note to this defendant, W. O. J., the said J. A. K. has otherwise disposed of the said property in and has otherwise depreciated in his ability to pay the said note for dollars so that at this time, and for many months since past, the said J. A. K. has been without the means of paying the said note for dollars and his said note is now of very much less value than it was upon the day of the making of the note herein sued on, and so these defendants say their note was never delivered to the plaintiff, and that the agreement was a transfer of the K. note to the said W. O. J. as a condition precedent to the delivery of their said note sued on.

Second ground of defense.

For a second ground of defense defendants replead in the same order everything set out in the first ground of defense, and say further, that there was no consideration for the transfer and making and delivery of their said note to the said W. E. L. and its transfer by him to plaintiff, and that this the plaintiff well knew; that at the time of the making of the said note it was agreed between all the parties, to-wit, plaintiff, W. E. L., W. O. J. and J. E. G. that the consideration for the making of the said note by these defendants should be the delivery to the said W. O. J. of the said J. A. K. note for dollars then held by plaintiff, in order that said J. might collect the same and apply the same upon the note by these defendants to the said W. E. L.; that the plaintiff failed and refused to deliver the said K. note to the said W. O. J. though often requested so to do,

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therefore the consideration for the making of the note herein sued on failed, and that all of these matters were well known to the plaintiff.

Wherefore having fully answered these defendants ask that plaintiff take nothing by reason of its petition and that they may recover their cost herein laid out.¹⁰

305. ANSWER ADMITTING EXECUTION OF NOTE ALLEGING TRANSFER AFTER MATURITY, AND WITHOUT CONSIDERATION, AND TO DEFRAUD DEFENDANT.

Defendant admits the execution of the note sued on in this action, but denies that the said note was sold and transferred to plaintiff before the same became due, but that on the contrary the H. M. W., the original payee of the said note, was the owner of the same at the time of its maturity, and that the same was transferred to plaintiff without consideration and for the purpose of cheating, wronging and defrauding this defendant.¹¹

306. ANSWER ADMITTING EXECUTION, DENYING NEGOTIABILITY SETTING UP TRANSFER WITHOUT CONSIDERATION, AFTER MATURITY, AND BREACH OF WARRANTY.

Now comes the said defendant, W. H. B., and for his answer to the petition of plaintiff filed herein says:

1. He admits the execution of the note set up in plaintiff's petition; and also that the plaintiff is a corporation; but denies each and every other allegation, statement and averment therein contained.

¹⁰ From form in record in *Citizens Bank of Wakita v. Garnett*, 21 Okla. 200.

¹¹ Form in *Bank of Commerce v. Schlegel*, 66 Kan. 500. The petition in this case alleged the execution of the note, its indorsement in blank and transfer to plaintiff, and the reply to the answer being a general denial the burden of proof was upon defendant.

Any set-off to a promissory note which would have been good between original parties may be pleaded against an indorsee who acquires it after maturity, as he takes it subject to any set-off which the maker had against any prior holder. *Wilbur v. Jeep*, 37 Neb. 604; *Davis v. Neligh*, 7 Neb. 78.

Form of answer admitting execution of note, denying that plaintiff purchased before maturity, and setting up a breach of warranty. *Farmers & Merchants Bank v. Upham*, 37 Neb. 417.

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2. For further answer this defendant says, that the note sued on by plaintiff in this action is not by its terms and conditions a negotiable instrument by the law-merchant.

3. The plaintiff has no corporate right to become purchaser and owner of said note.

4. Said plaintiff did not purchase said note in good faith and for a value consideration.

5. The said note was transferred to plaintiff without consideration, and for the purpose of cheating, wronging and defrauding the defendant.

6. The said note was transferred to plaintiff after maturity of the same.

7. And for further answer this defendant says, that the consideration for said note was a W. A. W. binder and harvester combined, and that he purchased the same from J. S., who was then and there acting as the duly-authorized agent of J. E. H. & Co., the parties to whom defendant executed said note, and whose property the said machine was at the time the same was purchased by the defendant; and that the said J. E. H. & Co., through their said agent, represented to this defendant that the said harvester and binder would do good work, and was suitable for the purpose for which it was sold, and then and there warranted the same to be perfect in its construction, and that the same was in all respects a first-class machine; and the defendant, relying upon the representation of said J. E. H. & Co., purchased said machine and executed therefor his several promissory notes, one of which, the said note hereinbefore mentioned, is one.

And the defendant further says that said machine was not what it was warranted and represented to be, but that it was worthless and wholly unfit for the purposes for which it was to be used; that the same was not properly constructed; that the various parts of the machine were not properly adjusted, and the same would not work, and could not be worked, so it was a total loss to this defendant; that the defendant notified the said J. E. H. & Co. of the failure of said machine to do the work as warranted and represented,

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and that after a fair and honest trial of said machine this defendant returned the said machine to said J. E. H. & Co. and demanded of them his notes which he had executed to said J. E. H. & Co. for said machine.

Wherefore, this defendant prays judgment against the said plaintiff for costs of suit.¹²

807. ANSWER ALLEGING THAT THE CONTRACT FOR WHICH THE NOTE WAS GIVEN WAS A WAGERING CONTRACT AND THAT THE NOTE WAS GIVEN FOR A LOSS IN TRADING IN OPTIONS.

Defendant, for answer and defense, herein complains of the plaintiffs and says that heretofore, on the day of, 19.., plaintiffs were commission merchants in C., Illinois; that plaintiffs at said time, in the firm name of N. H. W. & Co., dealt and traded in what are known as options, on 'change, in Chicago, in grain, by selling and buying in market on 'change certain grain for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold, or intended to be; that on said date defendant took an option of said plaintiffs on grain as aforesaid for future delivery, when in fact no delivery was ever intended or demanded and no grain was bought or sold, or intended to be; that the whole transaction was a venture and speculation on margins, depending for profit or loss on the fluctuations of the market, and purely a fictitious and gambling transaction; that in such and said transaction no consideration was received; that the said note sued upon herein was given for loss in so trading in said options, at said time as aforesaid, and is without consideration and wholly void, which plaintiffs well knew, in violation of the law and contrary to public policy.¹³

808. ANSWER PLEADING PAYMENT.

Defendant for his answer admits, that he executed and delivered to said plaintiff the note sued on, as in plaintiff's

¹² Form in State Savings Association v. Barber, 35 Kan. 488, 490.

Form of answer setting up special defense of breach of conditions of contract made when note was executed. Clapham v. Storm, 36 Neb. 499.

¹³ Form in Sprague v. Warren, 26 Neb. 326.

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petition alleged, and that the date of said note was on the day of, 19.., and was for the sum of dollars, and that said note was due thirty days after date, with ten per cent. interest from maturity.

Further answering defendant says that on the day of, 19.., this defendant paid said note in full to said bank, and said planitiff bank canceled and surrendered said note to this defendant, and the same was then and there fully paid and satisfied, and duly delivered to this defendant.¹⁴

809. ANSWER TO ACTION ON A NOTE ALLEGING ACCORD AND SATISFACTION.

The defendant, ..., answering, says he admits the execution of the note, and that before the commencement of this action he delivered to the plaintiff one wagon, which he received in full satisfaction of the note mentioned in plaintiff's complaint.¹⁵

810. ANSWER SETTING UP ALTERATION OF NOTE AFTER ITS EXECUTION.

Defendants say that the note sued on in this action was originally executed by them to H. A. P. S. M. Company; but that since its execution by them the same has been altered and so changed as to make it payable to O. B. H.; that said change was made without the knowledge or con-

¹⁴ Adapted from form in *Farmers Bank v. Harshman*, 33 Neb. 445.

Payment as a defense cannot be shown under a general denial. *Barker v. Wheeler*, 62 Neb. 150; *Markson v. Kothman*, 29 Kan. 515.

An unverified answer alleging payment and satisfaction of the debt, in an action on a note and mortgage, where the petition is sworn to, will put in issue the question of payment. *O'Bryan v. Standiford*, 47 Kan. 24.

An allegation in an answer that only a specified sum is due on the note in suit is a mere conclusion, and does not of itself constitute a defense to the action. *Hager v. Blake*, 16 Neb. 12.

¹⁵ Where an accord and satisfaction is attempted to be pleaded, the plea is bad when the performance necessary to constitute the satisfaction is not alleged, and it appears upon the face of the plea that performance, and not the agreement to perform, was to be received in satisfaction. *Perdew v. Tillma*, 62 Neb. 865.

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sent of these defendants, and is in fraud of their rights, and was so changed and assigned to the plaintiff for the purpose of preventing them from pleading thereto a failure of consideration and other equitable defenses existing against said note in favor of these defendants; that by reason of said change, which is material and fraudulent upon the rights of these defendants, said note has become and is absolutely void.¹⁶

811. ANSWER ALLEGING THAT NOTE WAS GIVEN FOR LAND WHICH PLAINTIFF WAS HOLDING IN EXCESS OF AMOUNT ALLOWED HIM.

Defendants state: That the supposed promissory note herein sued on in the petition mentioned was for the payment of the right to possession only of a certain tract of land, lying and being in the Choctaw Nation, I. T., more particularly described and known as the "S. C." or the old "J. C." place; the same being located about two miles north of O. G., C. Nation, I. T. That, at the time plaintiff sold defendants the right to possession to said tract of land, the plaintiff had no right, title, or interest in and to said tract of land or to the possession thereof, but that the said tract of land belonged in common to the C. and C. Tribes of Indians, and that plaintiff was a trespasser on the said tract of land, in that plaintiff, being a citizen of the C. Nation and a member of the C. Tribe of Indians and entitled to his pro rata allotment of lands, he at that time held more land in his possession than he was by law allowed, and this particular tract of land was in excess of his share of allotable land and of his allotment; he then and there holding the same in violation of the law, as against these defendants, who are also members of the C. Tribe of Indians.¹⁷

812. ANSWER OF MARRIED WOMAN AVERRING THAT SHE DID NOT SIGN WITH INTENTION TO CHARGE SEPARATE ESTATE, AND THAT SHE HAS NO SEPARATE ESTATE.

Now comes E. T. M., one of the defendants in the above

¹⁶ Form in *Horn v. Newton City Bank*, 32 Kan. 518.

¹⁷ Form in *Combs v. Miller*, 24 Okla. 576.

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entitled action, and for answer to the petition filed therein says:

That she is and has been for more than ten years last past the wife of her co-defendant J. C. M.; that she signed the notes mentioned in said petition without any consideration whatsoever; that she did not sign nor execute said notes with reference to or upon the faith of, or upon the credit of, or with the intention to charge, her individual or separate property for their payment; that said notes were handed to this defendant by her said husband at her residence and that she signed and returned the same to her said husband at his request without reading or examining the same and upon the faith of and in reliance upon his statement to her, at that time made, that her signature was only a matter of form; that she has not seen said notes since returning them to said J. C. M. and did not then know, nor does she now know, except as informed by said petition, that said notes contained a clause wherein and whereby it is sought to charge her separate property, as alleged in said petition.

Further answering this defendant says, that the plaintiff is and was at the times mentioned herein engaged in the business of banking in the city of O., Nebraska; that said J. C. M. was one of the depositors in or customers of said plaintiff; that the consideration received by said J. C. M. was placed by said plaintiff bank to the credit of said J. C. M. and not to the credit of this defendant; that said J. C. M. checked out said money for use in his own business or for other purposes of his own unknown to this defendant; that the plaintiff by placing said consideration to the credit of said J. C. M. and by paying his checks drawn therefor had full notice and knowledge that said money was intended to be and was used by J. C. M. in his own business and on his own account and that no portion thereof was intended to be or was in fact used with reference to or for the benefit of any property, trade or business of this defendant or otherwise for her benefit; that this defendant is not and was not engaged in any trade or business and the same was well

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known to said plaintiff; that on the and days of, 19.., and since said date this defendant has been the owner of no property other than certain household effects used by herself and family, but that said J. C. M. was on said and days of, 19.., and for a long time prior thereto had been possessed of a large amount of real and personal property situated in D. county, Nebraska, and elsewhere, of which said plaintiff at said times had full knowledge; that this defendant has never entered into any contract with or had any dealings with said plaintiff with reference to or for the benefit of any property, trade or business belonging to her; that no portion of the consideration for said notes has been used with reference to or for the benefit of her property, trade or business; that said notes and the consideration received by said J. C. M. therefor did not concern this defendant's separate property, trade, or business; that this defendant never made or caused to be made or permitted to be made any statement to said plaintiff or to any officer thereof as to her financial standing or as to any property belonging to her; and that this defendant never had any conversation or other communication with said plaintiff or any officer thereof either before or since the signing of said notes as to the giving, signing, execution or delivery thereof or in reference thereto.

Wherefore, defendant asks to be hence dismissed with her costs and for such other relief as she may be entitled to receive.¹⁸

¹⁸ From form in record in *McKell v. Merchants Nat. Bank*, 62 Neb. 608.

In an action against a married woman on a promissory note wherein she pledges her separate estate for its payment, an answer averring that at the time of its execution she was a married woman and had no separate estate and owned no property in her own right, states a good defense. *McKell v. Merchants Nat. Bank of Omaha*, 62 Neb. 608; *Kocher v. Cornell*, 59 Neb. 315.

The defense of duress is available to the wife in an action to foreclose a mortgage upon the homestead which she was compelled to sign through fear of bodily harm and abandonment by her husband, although it was given to secure the payment of a negotiable promissory

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note that had been transferred to an innocent holder before maturity. *Berry v. Berry*, 57 Kan. 691.

Denial by married woman that she charged her separate property with the payment of the note presents no defense. *Wicks v. Mitchell*, 9 Kan. 58.

Form of answer alleging failure to present notes for payment at the place made payable by terms of note. *Lantry v. French*, 33 Neb. 524.

Answer alleging that the plaintiff holds the note of a third party as collateral security for the note sued on states no defense. *Carson's Executors v. Buckstaff*, 57 Neb. 262.

Answer alleging that certain defendants were sureties only, stated no defense, where there are no allegations in the answer, and the note does not show that the plaintiff knew said defendants were only sureties. *Whittenhall v. Korber*, 12 Kan. 472.

That a promissory note was executed by way of accommodation is a good defense as against the payee, but not as against the indorsee, from whom money was obtained by virtue thereof, even though he had notice of the relation of the parties to each other. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801.

Alleged defects in a petition that "a copy of the note sued on is not attached to or filed with" it, and that "the names of parties are not properly entitled," can only be reached by motion. They are not grounds for demurrer. *Lash v. Christie*, 4 Neb. 262.

Allegations insufficient to constitute a defense. *Costello v. Wilhelm*, 13 Kan. 173; *Munn v. Taulman*, 1 Kan. 243; *Diven v. Spicer*, 1 Kan. 103.

Answer should set up a complete defense to the action. *McCormick Harvesting Machine Co. v. Koch*, 8 Okla. 374.

Statement of grounds of defense applicable to particular cases. *De-Cordova v. Hoss*, 56 Kan. 679; *Bobb v. Bancroft*, 13 Kan. 96; *Furneaux v. First Nat. Bank*, 39 Kan. 144; *Scott v. Morning*, 18 Kan. 489; *Lovejoy v. Citizens Bank*, 23 Kan. 233; *Manufacturing Co. v. Stark*, 45 Kan. 606.

CHAPTER LXXI.

BONDS.

813. Answer in action on bond of an employee setting up breach of warranties in the answers made by the employer in connection with application for bond.
814. Answer by sureties to an action on the bond of a bridge contractor, setting up change of contract after signing without notice to the sureties.
813. ANSWER IN ACTION ON BOND OF AN EMPLOYEE SETTING UP BREACH OF WARRANTIES IN THE ANSWERS MADE BY THE EMPLOYER IN CONNECTION WITH APPLICATION FOR BOND.

The defendant further alleges that the statements made and subscribed to by the defendant in "exhibit A" were warranties. That the answers to questions 9C, 10A, etc., in said "exhibit A" are wholly false and were known to be false by the plaintiff at the time the same were made, and that the duties of and check upon the said K. were not as set out in said answer, and that the liability under said bond was enlarged and varied from that contained in said written statement, and that no check whatever was had upon the said K. during the life of said alleged bond; that he was authorized to and did draw checks upon the said bank account; that settlements were not made once a week as warranted; that there was not a perfect report system or any other system which would ascertain the condition of the accounts of the said K. once a week. That there has been a breach of all of said warranties and that instrument is absolutely void.¹

¹ Form in United States Fidelity and Guaranty Co. v. Ridgley, 70 Neb. 622.

Form of answer to action on statutory bond given by a paving contractor, setting up facts which render contract illegal and void as against public policy. Sustained on demurrer in Surety Co. v. Brick Co., 75 Kan. 196.

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814. ANSWER BY SURETIES TO AN ACTION ON THE BOND OF A BRIDGE CONTRACTOR, SETTING UP CHANGE OF CONTRACT AFTER SIGNING WITHOUT NOTICE TO THE SURETIES.

For a first defense to plaintiff's said petition herein these defendants deny generally and specifically each and every allegation in said petition contained, except such allegations as are hereinafter expressly admitted.

And for a second defense these defendants respectfully state and show that the contract, plans and specifications were materially changed by said M. county, the plaintiff herein and its bridge commissioner, after the signing, sealing and delivering of said bond, the bond sued on in this case by these defendants, to the plaintiff, and after the said plans and specifications had been prepared by the bridge commissioner of plaintiff, approved by plaintiff's county court, and filed with the clerk thereof, that the abutments, masonry work and earth work of the approaches to said bridge as changed were not in accordance with the original plans and specifications then on file in the clerk's office of said county, the plaintiff, but of different dimensions and larger, more difficult to construct and to maintain, and costing said county much more, to-wit: dollars more than the estimated cost of said abutments and approaches according to the original plans and specifications aforesaid; and costing said county, this plaintiff, ... dollars more than was stipulated and called for in the contract between the plaintiff and the said D. H. for constructing and completing said works. That said changes in the said contract, plans and specifications were made by, and at the request of the said county of M. the plaintiff; that the said contract contained no provisions permitting or authorizing the said M. county or the said D. H. to make any change in said contract, plans and specifications for the construction or building of said abutments, masonry work and approaches. That said changes were made and said additional costs incurred after the entering into the contract aforesaid with the said D. H. by the plaintiff aforesaid, and after the approval of the plans and specifications by the plaintiff as

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aforesaid, and the filing of the same with the clerk of said M. county as aforesaid and after the execution and delivery of the bond sued on in this case by these defendants. That these defendants had no knowledge or notice of the change so made in said original contract, plans and specifications by said county, the plaintiff, and said D. H., and that the defendants never in any way, manner or form consented thereto. Defendants state that said contract, plans and specifications are now in the possession of the said M. county as these defendants verily believe that by reason of said changes and alterations aforesaid and the abandonment of said original plans and specifications these defendants are freed and wholly discharged from any and all liability and obligation on said bond.

And for a third and further defense to the plaintiff's said supposed cause of action, defendants say and show to the court that the said M. county, the plaintiff in this action, has wholly failed and neglected to cause any repairs, if any are or were necessary to be made on or about said bridge as was required by section, of the Revised Statutes of of, and as is required by section of the Revised Statutes of of, and that the said M. county, the plaintiff, has incurred no expense whatever in making repairs upon said bridge.

Wherefore these defendants say that this action was prematurely instituted, and that plaintiff has no right to have or maintain this action against these defendants, and ask the court that this action may be dismissed, and for judgment against this plaintiff for their costs.²

² From form in record *Morgan Co. v. McRae*, 53 Kan. 358. See form No. 198 for petition in this case.

An unverified general denial in an action on a forthcoming bond admits the execution of the bond but puts in issue an allegation in the petition to the effect that the property was delivered to the defendant when the bond was approved by the sheriff, and also puts in issue an allegation that the defendant had removed the attached property from the territory, and failed to surrender it to be sold to satisfy the judgment pursuant to the terms of the bond. *Dunn v. Claunch*, 15 Okla. 27.

In an action on an official bond, or other bond of indemnity, the

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plaintiff is not, by an answer consisting of a general denial, relieved of the necessity of proving the loss or injury out of which his right of action arose. *Barker v. Wheeler*, 62 Neb. 150.

In an action upon a recognizance, where the plaintiff alleged a default on the part of the principal, but did not allege that the default was ever made a matter of record, and the defendant in his answer denied generally all the allegations of the plaintiff's petition, held, that the answer put in issue all material averments of the petition except the execution of the recognizance, and that the court below erred in sustaining a demurrer to such answer. *Ingram v. State*, 10 Kan. 472.

In an action on the official bond of the treasurer of a school district where the petition sets forth a copy of the bond executed by the district and contains allegations of the organization and existence of such school district, these allegations are admitted where the answer filed denying them is not under oath. *Wands v. School District No. 71*, 19 Kan. 204.

Contract illegal. In an action upon a bond to recover for material furnished to a contractor and used in paving streets of a city, an answer which sets up the facts which render the contract between the city and the contractor illegal and void as against public policy, and states that any material furnished by plaintiff was with full knowledge of all such facts, states a good defense, and a demurrer thereto should be overruled. *National Surety Co. v. Kansas City Hydraulic Press Brick Co.*, 73 Kan. 196.

Where certain bonds of D. county were claimed by defendants to be illegal, held, that the facts showing such illegality must be stated in the answer. *Miller v. Hurford*, 13 Neb. 13.

To be available as a defense that the signature of a surety was obtained by fraud it must be pleaded. *Hart v. Mead*, 53 Neb. 153.

Where it is claimed that the surety is released by reason of payments having been made to the contractor in violation of the terms of the contract, the facts constituting such defense must be pleaded in the answer and proven upon the trial. *Hayden v. Cook*, 34 Neb. 670.

Sureties on a stay bond cannot, in an action against them on such bond, plead their lack of legal qualification to become sureties on such bond. *Heater v. Pearce*, 59 Neb. 583.

In an action against an officer for approving an insufficient replevin bond, the fact that the plaintiff afterward seized the property on execution is a defense *pro tanto*. *Shull v. Barton*, 58 Neb. 741.

In an action on the bond of the treasurer of a school district for a failure to account for money belonging to the district, an answer admitting the receipt of the money, but not showing it to have been lawfully disbursed by him, is demurrable. *Ward v. School District No. 15*, 10 Neb. 293.

Where the plaintiff sues the sureties on a redelivery bond, no defense can be set up in the action on the redelivery bond which could with

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reasonable diligence have been set up or interposed in the replevin action. *Boyd v. Huffaker*, 40 Kan. 634.

In a suit on a bond, an answer pleading that a defendant signed on condition that others named should also sign before the bond should be delivered and that such others did not sign, is insufficient unless it further alleges that plaintiff had notice of the condition. *Hart v. Mead Inv. Co.*, 53 Neb. 153.

CHAPTER LXXII.

CARRIERS OF FREIGHT.

815. Answer setting up failure on part of plaintiff to properly pack goods shipped.
816. Answer of defendant to petition for damages for freight lost to plaintiff, setting up a special contract relieving defendant from liability.

815. ANSWER SETTING UP FAILURE ON PART OF PLAINTIFF TO PROPERLY PACK GOODS SHIPPED.

Now comes defendant and for answer to plaintiff's petition herein filed admits that four crates of glassware were delivered by plaintiff to it as stated in the petition, but defendant says that the contents of said four crates being glassware were badly and negligently packed and all breakage mentioned in the petition of plaintiff was caused by reason of the bad packing of said glassware and not by the negligence or fault of this defendant.

Wherefore defendant prays to be dismissed with its costs.

816. ANSWER OF DEFENDANT TO PETITION FOR DAMAGES FOR FREIGHT LOST TO PLAINTIFF, SETTING UP A SPECIAL CONTRACT RELIEVING DEFENDANT FROM LIABILITY.

For other and further answer to the petition of plaintiff, defendant says that, on or about the day of, 19.., in the city of, ..., it entered into a certain written and printed special contract with the plaintiff wherein and whereby, in consideration of a certain reduced rate of freight, then and there given to the plaintiff by the defendant for the shipment hereinafter described, it undertook and agreed to transport to the end of its line only, certain property consigned and described as hereinafter set forth.

That said special contract was in words and figures as follows, to-wit: (set out bill of lading).

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And defendant says that other than said special contract, as hereinbefore set forth, it did not undertake or agree, at any time or place, to transport for the plaintiff or any of its agents any species of property whatever from any point to any point and that it never did at any time or place, undertake or agree to transport any species of property whatever, from any point to any point for the plaintiff, or any of its agents, as a common carrier.

Further answering, defendant says that for and in consideration of the reduced rate of freight given to plaintiff as aforesaid, it was expressly agreed by and in said special contract that neither the defendant, nor any of its connecting lines, should be liable to the plaintiff for any loss or damage to said property occasioned by fire not caused by the negligence of defendant or by its connecting lines. . . .

Further answering, defendant says that for and in consideration of the reduced rate of freight given to plaintiff as aforesaid, it was expressly agreed in said special contract that said property should be transported by the defendant and its connecting lines at the risk of the plaintiff.

Further answering, defendant says that it kept and fully performed all the terms and conditions of said special contract. That at the time of the execution of said special contract, as now, as plaintiff well knew, the defendant's line of railway extended westwardly from the city of, ..., in the direction of the State of, terminating at K. C., ...

That defendant transported said property under said special contract as aforesaid, in due time, over its line of railway from the city of to the end of its line as aforesaid, and there delivered the same in good order to its connecting line, the C., R. I. & P. Railway Co.

That said C., R. I. & P. Railway Company transported said property under said special contract over its line of railway in due time from K. C., ..., to B., ..., and there delivered the same, in good order, to its connecting line, the F. W. & D. C. Railway Company. That while said property was in the possession of said F. W. & D. C. Railway

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Company, at B., ..., as aforesaid, it was, accidentally, and without any fault on the part of said F. W. & D. C. Railway Company, destroyed by fire.

Wherefore defendant says that plaintiff ought not to have or maintain this action, and having fully answered, prays to be discharged with its costs.¹

¹The defendant must plead and prove any special agreement it may have limiting its liability as a common carrier. *Chicago, Great Western Ry. Co. v. Dunlap*, 71 Kan. 67.

A defense that a contract is in violation of the interstate-commerce law of the United States must be pleaded. *Missouri, Kansas and Texas Ry. Co. v. Bagley*, 60 Kan. 424.

CHAPTER LXXIII.

CARRIERS OF PASSENGERS.

- 817. Answer containing general denial, and setting up attempt to ride on fast train which did not stop at station where passenger was to get off.
- 818. Answer alleging contributory negligence in stepping off a rapidly moving car.
- 819. Answer to action for damages alleging that plaintiff was not on defendant's train as a passenger, and pleading contributory negligence.
- 820. Allegation of contributory negligence in standing upon the inner footboard of a street car.
- 817. ANSWER CONTAINING GENERAL DENIAL, AND SETTING UP ATTEMPT TO RIDE ON FAST TRAIN WHICH DID NOT STOP AT STATION WHERE PASSENGER WAS TO GET OFF.

1. Now comes the defendant in the above-entitled cause, and for answer to plaintiff's petition filed therein, denies each and every material allegation therein contained.

2. The defendant, further answering, for a full and complete defense states: On the occasion complained of in the petition, the plaintiff attempted to ride on the fast passenger train of defendant, bound eastward, which train, according to the rules and regulations of the defendant, which were well known to the plaintiff and the traveling public, generally did not stop at P., and that the conductor of said train put the said plaintiff off of the said train, using no unnecessary force, because the plaintiff refused, after demand, to pay fare to the station beyond P., namely, F., at which said train would stop; and further, because said plaintiff, when the conductor informed him that the train would not stop at P., insisted upon riding upon said train, and used violent, profane and offensive language, and behaved

in such an indecent manner as to authorize and justify the defendant's conductor in ejecting him from the train.

Wherefore defendant prays judgment.¹

818. ANSWER ALLEGING CONTRIBUTORY NEGLIGENCE IN STEPPING OFF A RAPIDLY MOVING CAR.

And for further answer and defense defendant states that plaintiff's alleged injuries were caused by his own negligence in getting aboard defendant's car without then and there intending to become a passenger thereon, and after having so boarded said car, and after said car had started and got into rapid motion, plaintiff thus carelessly and negligently voluntarily left said car, while the same was in rapid motion, and by thus carelessly and negligently leaving said car while the same was in rapid motion, plaintiff was thrown to the ground, and thereby and by reason of his own carelessness and negligence, as aforesaid, plaintiff received and suffered the alleged injuries of which he complains.

819. ANSWER TO ACTION FOR DAMAGES ALLEGING THAT PLAINTIFF WAS NOT ON DEFENDANT'S TRAIN AS A PASSENGER, AND PLEADING CONTRIBUTORY NEGLIGENCE.

Defendant states that the plaintiff herein at the time and place of the alleged accident, was not upon defendant's train as a passenger, and had no legal right to be thereon; that said defendant was not guilty of any negligence in respect to any legal duty which it owed plaintiff; that said plaintiff was injured, if at all, by reason of his own gross negligence and recklessness in moving about upon defendant's train while it was in motion without any reason or justification therefor. That said plaintiff was guilty of gross negligence, not only contributing to, but directly causing his own injury, in that he was unnecessarily, negligently, and carelessly standing up or moving about in defendant's caboose while the train was in motion, and by reason of such negligence, recklessness and carelessness sustained the injury, if any, complained of, without the fault or negligence of said defendant.

¹ Form in *Atchison, Topeka & Santa Fé v. Gants*, 38 Kan. 608.

820. ALLEGATION OF CONTRIBUTORY NEGLIGENCE IN STANDING UPON THE INNER FOOTBOARD OF A STREET CAR.

For further answer and defense, defendant says that plaintiff's alleged injuries were caused by his own negligence in standing upon the inner foot board of the car upon which he was riding, in a position then known to plaintiff to be attended by the danger of being struck and injured when said car should be passing a south-bound car on said J. avenue, and while plaintiff was in such position he was struck and injured when passing such south-bound car.

CHAPTER LXXIV.

CONTRACT.

- 821. Answer to action on a contract setting up misrepresentation and fraud, and that contract was signed without reading it.
- 822. Answer setting up former adjudication.
- 823. Answer to a petition on a building contract for amount due setting up failure to perform according to the contract and damages from said failure to perform the contract.

821. ANSWER TO ACTION ON A CONTRACT SETTING UP MISREPRESENTATION AND FRAUD, AND THAT CONTRACT WAS SIGNED WITHOUT READING IT.

Defendant for answer to the petition of plaintiffs states that he signed the pretended contract set up in plaintiffs' petition, but that his signature thereto was procured by the fraud and misrepresentation of the plaintiffs' agent, one L.; that the said plaintiffs through their agent agreed to ship this defendant a consignment of jewelry, to be sold by defendant on commission; that this defendant never agreed to purchase or ever did purchase said jewelry or any jewelry of plaintiffs; that the plaintiff's agent presented to defendant a printed paper and represented to defendant that it contained their agreement, and was a contract to sell said jewelry on commission; that defendant was not to be liable to plaintiffs for any of said jewelry except such as he might sell on commission.

That defendant is unable to read without his spectacles, which were not at hand; that it was dark in the room at the time, and plaintiffs' said agent was urging haste, as he had to catch a train, and defendant was very busy at the time; that plaintiffs' said agent represented the contract to be as stated and as they had verbally agreed, and relying upon the statements of plaintiffs' agent and believing the same to be true defendant signed said contract without reading the same.

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That on the day after signing said contract defendant examined the same and found it was not as represented, and immediately wrote to the plaintiffs, canceling said pretended order, stating the facts herein, and refusing to receive or accept said goods.

That defendant never has accepted or received said goods, and is in nowise liable therefor.¹

§22. ANSWER SETTING UP FORMER ADJUDICATION.

And this defendant further alleges and shows to the court that said action was commenced and prosecuted for the recovery of the damages occasioned to the plaintiff by reason of the breach of the several pretended contracts referred to in the original and amended petitions herein, as will more specifically appear by reference to "exhibit 1" hereto attached and that the recovery had, as fully appears from the verdict and findings of the jury, as disclosed by "exhibit 4" herein, is for the amount of plaintiff's damages by reason of the breach of each and all of said several pretended contracts referred to in the original and amended petitions herein; that the plaintiff named in "exhibit 1" is the same person named as plaintiff in the original and amended petitions filed in this action; that the defendant in both cases is the same; that the several pretended contracts referred to and described in "exhibit 1" are the same identical contracts referred to in the original and amended petitions herein; that the alleged breach of said several pretended contracts alleged in "exhibit 1" is the same indential breach of each of said contracts that is charged in the original and amended petitions in this case; that the damages claimed in this case are a part and parcel of the damages alleged to have been occasioned by the breach of each of said pretended contracts as alleged in said "exhibit 1"; that it is not claimed in either "exhibit 1" or in the original and amended petitions herein that there was more than one breach of each of said several pretended contracts.

And this defendant further alleges and shows to the court

¹ Form in *Shook v. Puritan Mfg. Co.*, 75 Kan. 301.

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that the violation and breach of each one of said pretended contracts constitute a single and entire cause of action, and that any damages which the plaintiff sustained by reason of said breach of any one of said pretended contracts could be recovered in a single cause of action, and, as fully appears by exhibits "1," "2," "3," "4," and "5" hereto attached, plaintiff has had one recovery for the breach of each and all of said pretended contracts, and that whatever further damages he claims he sustains for the breach of any one and all of said pretended contracts are merged in the action which he has already prosecuted to final judgment and in the judgment which he has therein obtained against this defendant; that because thereof the plaintiff is estopped from further prosecuting this action, or any other action for the recovery of any damages because of the alleged breach of any one or all of the several pretended contracts referred to in the original and amended petitions herein; that the judgment heretofore rendered in case No. is *res judicata* and conclusive upon the parties herein as to the amount of plaintiff's damage by reason of the alleged breach of the several pretended contracts referred to in the original and amended petitions herein.²

823. ANSWER TO A PETITION ON A BUILDING CONTRACT FOR AMOUNT DUE SETTING UP FAILURE TO PERFORM ACCORDING TO THE CONTRACT AND DAMAGES FROM SAID FAILURE TO PERFORM THE CONTRACT.

Defendant for his answer to the petition of plaintiff heretofore filed herein denies each and every allegation contained in each of the said counts of said petition, except such as are herein specifically admitted to be true.

Defendant admits that he made and entered into an agree-

² Form in Missouri, Kansas and Texas Ry. Co. v. Bagley, 65 Kan. 188, 190, 191.

Form of answer to action for breach of an alleged contract to destroy a certain lot of prairie dogs, denying performance of the conditions of the contract. Craig v. Weitner, 33 Neb. 484.

Form of answer to petition on contract alleging failure on part of plaintiff to exercise proper care in keeping and feeding certain cattle during the winter. Calland v. Nichols, 30 Neb. 532, 534.

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ment or contract with plaintiff at about the time set forth in said petition, by the terms of which he agreed to pay plaintiff the sum of dollars for building a house and kitchen for defendant at the place, in the time and manner and with the materials in certain specifications and plans described and set forth, which said specifications and plans were attached and made a part of said contract and agreement. That he has paid thereon the sum of dollars.

For another and further defense to the claim of plaintiff as set forth in the petition, said defendant states that plaintiff, in said agreement, bound himself and promised to erect and build a house for said defendant as per specifications attached to said agreement and made a part thereof; and that all work upon and about said house was to be done in a good, workmanlike manner and within the time therein specified; and all materials in said building were to be such as were mentioned and described in the attached specifications. That the said plaintiff failed, neglected and refused to perform the conditions in his said contract. That he failed, neglected and refused to furnish the materials used in the construction of said building of the kind and grade specified in said contract; but instead thereof furnished materials therefor greatly inferior in kind, quality and grade to those required and specified in the contract aforesaid. That said plaintiff further failed, neglected and refused to comply with his said contract in this: That he failed and neglected to perform the work in building said house in a skillful and workmanlike manner; but, on the contrary, did his work thereon in very defective and unskillful manner. That the said defendant, by reason of the failure of said plaintiff to comply with his contract as aforesaid, has been and is now damaged as follows, to-wit: (here set out specifically the damages).

Said defendant says that the total damages by reason of the failure of said plaintiff to comply with his part of said contract as set forth in said contract and specifications is, and was, the sum of dollars; which he asks the court to allow as a set-off or counterclaim against any sum, if any,

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which may be shown to be due to plaintiff on the trial of this cause. Said defendant further says that in all the items above mentioned he has suffered damages by reason of the fact that plaintiff failed and neglected to comply with his said contract; and furnished him with defective and unfit lumber in the construction of said building and did the work in an unskillful and unworkmanlike manner; and that the above sums are the damages which he has actually sustained thereby; for which defendant prays judgment and for his costs, and all proper relief.³

³ Under a general denial defendant may show that the contract sued upon is invalid under the statute of frauds. *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339.

In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made. *Sorenson v. Townsend*, 77 Neb. 499.

Where defendant is sued for an accounting for goods alleged to have been received under the terms of a written contract of agency, he may, under a general denial, show that the goods in controversy were received under another and different contract from that laid in the petition. *Acme Harvester Co. v. Curlee*, 77 Neb. 666.

When suit is brought upon a contract, a general denial puts the making of the contract in issue, and the burden devolves upon the plaintiff of establishing it substantially as alleged. *Rawlings v. Young Men's Christian Ass'n*, 48 Neb. 216.

In an action against a defendant for the value of materials alleged to have been sold to him under a verbal contract, he may, under a general denial, prove that the contract on which the cause of action is based was made with and the material sold to a third party. *Wiedeman v. Hedges*, 63 Neb. 103.

It is not necessary that the existence of a parol contract be denied in pleading, in order to render the defense of the statute of frauds available, but the pleader may admit the contract and yet plead and insist upon the statute and its application thereto. *Thomas v. Churchill*, 48 Neb. 266.

What not admissible under a general denial. Where the plaintiff sues for damages for the breach of an executory contract for the sale of personal property evidence of a subsequent annulment of the contract by mutual consent is not admissible under a general denial. *Hager v. Donovan*, 75 Kan. 43.

In an action on a contract, where the answer is a general denial, it is not error to exclude evidence which has no tendency to disprove the averments of the petition. *Denney v. Stout*, 59 Neb. 731.

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Want of consideration as a defense to a written contract must be pleaded and cannot be raised under a general denial. *Avery Manufacturing Co. v. Lambertson*, 74 Kan. 304; 86 Pac. 456.

Illegality of a contract as a defense must be pleaded. *Horton v. Rohlf*, 69 Neb. 95.

In an action upon a contract, fair and legal on its face, if it is claimed by the defendant that the contract is void as being illegal and against public policy, such illegality must be pleaded or it will be disregarded by the court in which such action is pending. *Atchison & Nebraska R. R. v. Miller*, 16 Neb. 661.

A plea of usury must state with whom the agreement alleged to be usurious was made, when made, where made, and the facts which it is alleged make the transaction usurious. It must also state the amount of interest agreed to be paid, taken, or reserved, or that was paid, taken, or reserved in the transaction. *Rainbolt v. Strang*, 39 Neb. 339.

The plea of duress as a defense to an action upon a contract is sufficient if it shows that, by reason of threats or other unlawful means, the defendant was deprived of his free will and understanding, and that the contract sued upon was not his free and voluntary act. *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383.

Want of mutuality in a contract is no defense to an action for specific performance, where the party not bound thereby has performed all the conditions of the contract on his part, and has brought himself clearly within its terms. *Rank v. Garvey*, 66 Neb. 767.

Special defense. Where a party to a contract inserts a provision exempting him from fulfilling because of a condition which may afterwards arise, he must, when sued for a breach of the contract, plead in defense the existence of the condition in order to have the advantage thereof. *Omaha Feed Co. v. Rushforth*, 75 Neb. 340.

In a suit by a vendor to foreclose upon a contract for the sale of real estate, if the vendee seeks the enforcement of the contract and pleads a tender of a sum to pay the remainder of the purchase price, he thereby admits that the vendor is entitled to a decree of foreclosure for the amount tendered. *Portsmouth Savings Bank v. Yeiser*, 81 Neb. 343.

CHAPTER LXXV.

CONVERSION.

824. Answer admitting taking property but alleging that ownership of same was in third party.

824. ANSWER ADMITTING TAKING PROPERTY BUT ALLEGING THAT OWNERSHIP OF SAME WAS IN THIRD PARTY.

Now comes defendant and for answer to plaintiff's petition herein filed admits that on the day of, 19... he took into his possession and did convert to his own use the property described in plaintiff's petition, but defendant states that said property was not taken from the possession of the plaintiff, but that said property was turned over to him by J. G., who was the owner of the property, and had the possession of it at the time it was turned over to the defendant. Defendant states that the plaintiff herein is not the owner of said property and did not at any time have the right to the possession of said property, but the ownership and right to said possession was at all times in J. G.

Wherefore having fully answered defendant prays to be dismissed with his costs.¹

¹ Under a general denial the defendant is not limited to counter-evidence of the conversion, but may impeach the plaintiff's claim of title to the property as fraudulent or otherwise. *Campbell v. Drug Co.*, 7 Kan. App. 501; *Kerwood v. Ayres*, 59 Kan. 343.

In an action to recover the value of personal property, a general denial puts in issue the plaintiff's allegation of ownership. *Hopkins v. Dipert*, 11 Okla. 630.

In an action grounded upon an alleged conversion of money, neither payment nor accord and satisfaction can be shown under a general denial. In an action against the sureties on an official bond for money converted by their principal during his official term, where the answer is a general denial, it is error to exclude evidence tending to show the

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date when the conversion actually occurred. *Barker v. Wheeler*, 60 Neb. 470.

Ownership by third person. Defendant may set up as a defense ownership of the property by a third person and show that what he did with reference to the property was as the agent of said third person. *Huffman v. Parsons*, 21 Kan. 340.

Settlement as defense. In an action for the value of property alleged to have been converted by the defendant, the answer was "That the defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters and things in dispute, which settlement and arbitration included all matters and things in controversy between plaintiff and the defendant at the time, and, more especially, the matter referred to in the petition." It was held to present the issue of settlement as a distinct and separate defense, and that the defendant is not confined to proof of the arbitration alleged. *Forbes v. Petty*, 37 Neb. 899.

An answer attempting to set up a defense by way of a second count, which admits the taking of the property, and alleges that it was taken under a chattel mortgage given by the husband of the plaintiff, and that the husband of the plaintiff was the owner of the property, does not state a defense, and a demurrer thereto was properly sustained. *Hopkins v. Dipert*, 11 Okla. 630.

Form of answer in action for the damages for the conversion of certain goods which had been levied upon and sold by the sheriff. *Hill v. Helman*, 33 Neb. 731.

CHAPTER LXXVI.

COVENANT.

825. Answer to action for breach of covenant of warranty in deed.

825. ANSWER TO ACTION FOR BREACH OF COVENANT OF WARRANTY IN DEED.

Comes now the defendants in the cause herein and for answer to plaintiff's petition, say:

1. Defendants deny each and every material allegation in the said petition alleged, except such as hereinafter expressly admitted. Defendants admit that they executed a warranty deed to plaintiff for the property set forth in plaintiff's petition.

2. Defendants for further answer say that at the time said warranty deed was made and executed by the defendants herein, the plaintiff herein made and entered into a contract with the defendants that the pasture land on the land described in said deed should be subject to the contract by and between defendants herein and P. B., wherein it was understood by the parties to this action that said defendants were to retain the pasture land on said tract or tracts of land deeded by warranty as aforesaid until the day of, 19...

3. Defendants for further answer say that the contract was made by and between the defendant herein and P. B. was well and fully understood by the plaintiff herein and at the time of the execution of the warranty deed hereinbefore mentioned, and being that sued upon by plaintiff herein; said contract between defendant and said P. B., for the use of pasture land on said tract or tracts of land being for less than one year, and said contract as ratified by plaintiff herein being less than one year duration.

4. Defendants deny that they have alienated by deed or

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otherwise any portion of said land, except that fully understood to have been reserved or alienated by reason of the right of way of the A. T. & S. F. R. Co., and for town-site purposes understood and agreed to by both of the parties to this action at the time the warranty deed herein was made, and that any failure to recite said reservations in said warranty deed was purely a clerical omission.

5. Defendants further answering say that because of the suit herein, they have been needlessly and wrongfully subjected to the necessity of defending themselves against a suit or action at law, and thereby been threatened with phlebotomy at the hands of plaintiff.

6. Defendants because of their necessity in defending this action allege that they have been damaged by plaintiff in the sum of dollars.

Wherefore, defendants pray that plaintiff take naught by this action; that defendant have and recover the sum of dollars as liquidated damages and the costs of this action.¹

¹ From form in record in Hoffman v. Hendricks, 21 Okla. 479. For petition in this case see form No. 305.

In an action for damages for a breach of covenant against incumbrances contained in a deed, an answer charging that the deed executed by the grantors does not contain a correct expression of the intention of the parties in regard to the transaction sufficiently alleges the mutuality of the mistake. *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5.

CHAPTER LXXVII.

CREDITORS' BILLS.

826. Answer to creditor's bill setting up statute of limitations.

826. ANSWER TO CREDITOR'S BILL SETTING UP STATUTE OF LIMITATIONS.

Comes now the defendant E. T. P. & Co., and by leave of court first had and obtained, files this its supplemental answer and shows to the court that since the said pretended judgment for the sum of dollars was obtained on the day of, 19.., in the district court of L. county, Oklahoma, as alleged in plaintiff's petition and since the commencement of this action, said judgment has become dormant; that no execution has ever been issued upon said judgment and there has been no revivor of said action, and said judgment is now dormant and is barred by the statute of Oklahoma, being paragraph 4337, section 459 of the code of civil procedure, 1893. That said judgment was rendered more than five years before the passage of section 1 of chapter 39, of the Session Laws of 1895, and was never revived by the issuance of an execution, or any attempt to revive the same before the day of, 19... That said judgment is now barred as against the said M. Brothers.

State of Oklahoma, }
County of } ss:

A. R. B., being duly sworn says that she is one of the defendants herein, and the surviving member of the firm of E. T. P. & Co., that she has read the above supplemental answer, and that the facts stated therein are true, as she verily believes.

A. R. B.

Subscribed and sworn to, etc.¹

¹ Form in Miller & Co. v. Melone, 11 Okla. 241.

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An answer which alleges that the debtor had property subject to levy upon execution, in the absence of allegation of fraud or collusion on the part of the sheriff, does not state a defense to a creditor's suit brought to set aside a fraudulent conveyance which alleges the return of an execution *nulla bona*. Nebraska Nat. Bank v. Hollowell, 63 Neb. 309.

General denial. In an action by creditors to set aside a conveyance of real estate alleged to have been made in fraud of their rights, the defendant may, under a general denial, give evidence of any fact tending to disprove the charge of fraud. Plummer v. Rohman, 62 Neb. 145.

CHAPTER LXXVIII.

DAMAGES.

827. Answer in action against a saloon keeper for damages for selling intoxicating liquors.

827. ANSWER IN ACTION AGAINST A SALOON KEEPER FOR DAMAGES FOR SELLING INTOXICATING LIQUORS.

1. The defendant, answering the plaintiffs' petition, admits that he was a saloon keeper as charged, and that S. E. T. and the other plaintiffs were the wife and children of W. E. T. and were dependent on him for their means of support, and that they constitute one family.

2. Said W. H. T. was on and prior to the day of, 19.., a man who indulged in the use of intoxicating liquors, and by reason of this habit for several years prior to, 19.., had neglected and failed to appropriate all his earnings and time to the support of his family.

3. Defendant says that from to he did not sell nor give, nor permit to be sold or given by his agents or employees, to W. H. T. any intoxicating liquor of any character.

4. Defendant avers that said plaintiffs ought not to have and maintain their action against him for loss of their means of support, by reason of the selling or furnishing of intoxicating liquor by said defendant to said W. H. T., during that portion of the time mentioned in plaintiffs' petition from and after, 19.., to the commencement of this action, for the reason that the defendant says that on or about the last mentioned date the plaintiff, S. E. T., personally directed and requested the defendant to let the said W. H. T. have intoxicating liquor by the drink whenever he wanted it, which request has never been withdrawn, and all liquors thereafter sold and furnished by the defendant to said W.

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H. T. were so sold and furnished in pursuance of such request and direction of said plaintiff. This was done with great care on the part of said defendant to restrain said W. T. from drinking such an amount as would cause him to become intoxicated.

5. Defendant denies each and every allegation in said plaintiffs' petition contained, and not hereinbefore admitted.¹

¹ Form in *Roberts v. Taylor*, 19 Neb. 184.

A defendant in an action for damages arising in tort may in his answer, offer to confess judgment for a specified sum, and if judgment be not recovered for a larger amount, a judgment for costs of the action which accrued after the filing of the answer should be rendered against plaintiff, and all costs made before the filing of the answer should be taxed against defendant. *Kaw Valley Fair Asso. v. Miller*, 42 Kan. 20.

In an action by a widow to recover damages for the death of her husband, who was, at the time of his decease, a resident of this state, the allegation of the petition that no personal representative of the estate of the deceased is or has been appointed is put in issue by an unverified denial; and if, on the trial, no proof of the fact be made, a demurrer to the plaintiff's evidence is rightfully sustained. *Vaughn v. Kansas City Northwestern R. R. Co.*, 65 Kan. 685.

In an action for damages, an amendment of defendant's answer by incorporating therein a general denial in addition to the matter formerly set up as defense, does not change substantially such defense where the former answer did not contain a specific admission of the amount of damages claimed in plaintiff's petition. *Smock v. Carter*, 6 Okla. 300.

In order for the officer who has taken the property, under an execution, to make his justification complete, he must aver in his pleadings and show in his evidence a valid writ, issued by a court of competent jurisdiction, and if he has not averred these facts and proved them, his defense must fail, if he invokes the rule upon his authority as an officer under a writ of execution. *Masters v. Teller*, 8 Okla. 271.

Answer setting up damages by way of a counterclaim held in that case insufficient. *Kansas Loan and Investment Co. v. Hutto*, 48 Kan. 166.

CHAPTER LXXIX.

DIVORCE.

828. Answer containing general denial and cross petition in two counts, the first alleging that plaintiff had a husband living at time of marriage and second count based on extreme cruelty.

828. ANSWER CONTAINING GENERAL DENIAL AND CROSS PETITION IN TWO COUNTS, THE FIRST ALLEGING THAT PLAINTIFF HAD A HUSBAND LIVING AT TIME OF MARRIAGE AND SECOND COUNT BASED ON EXTREME CRUELTY.

The defendant denies each and every allegation in plaintiff's petition except as hereinafter expressly admitted.

Defendant admits that he is the owner of the property described in plaintiff's petition and that said plaintiff has been for more than one year last past a resident of the State of Kansas and she is now a resident in good faith in the county of S. in said state; and that on the day of, 19.., at the county of S. and State of Kansas said plaintiff was married to the defendant.

Defendant further states that he is the owner of the following described premises situated in S. county (here describe), and that the same was purchased by his separate property and individual earnings, and that the plaintiff never paid any consideration for said lands.

CROSS PETITION.

FIRST CAUSE OF ACTION.

Defendant alleges that he is an actual bona fide resident of the State of Kansas, and has been for more than one year last past an actual bona fide resident of the said county and state; and defendant states that on the day of, 19.., at K., Tenn., the plaintiff, whose maiden name was then R. S., married one J. J. C. and at the date of the

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marriage of the plaintiff to this defendant the plaintiff was still the wife of J. J. C. and the said J. J. C. was living and the plaintiff was not divorced from said C. at the time of her marriage to this defendant and which fact was unknown to the defendant at that time.

Defendant further says that he was induced to enter into the marriage relation with the plaintiff by reason of fraud of the plaintiff, that said plaintiff represented to him that she was a single woman and that her name was R. S., and that she had obtained a divorce from her husband at C., Mo., and that her husband's name prior to the time of such divorce was V. C., when in truth and in fact her husband's name was not V. C., but was J. J. C. and that she never did obtain any divorce from her former husband, and that he was living at the time of the marriage of plaintiff to this defendant; and her said husband had abandoned her at C., Missouri, a few months prior to the time of her marriage with this defendant.

Defendant further says that he was not aware that plaintiff was not divorced at the time of their marriage until after plaintiff had filed her suit for divorce and until about the day of, 19..; that if the defendant had known that plaintiff was not divorced he would not have married her; that he has not cohabited with her nor lived with her as husband and wife since the discovery of said fraud.

SECOND CAUSE OF ACTION.

The said plaintiff has been guilty of extreme cruelty; that during all of the year 19.. and up until the day of, 19.., plaintiff has continually without any cause whatever, and for the purpose of annoying and making life miserable for the defendant, accused him of unchastity; and for the period of about six months he was confined to his bed and room; and that during said period said plaintiff continually and falsely accused the defendant of having committed adultery and associated with unchaste women, when in truth and in fact, as plaintiff well knew, he was confined to his room and bed and that no female person had visited said room; and

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that on the day of, 19.., while defendant was still sick and unable to leave his room the plaintiff abandoned the defendant and removed to another place in the city of W.

Defendant further states that plaintiff was wholly without money when they were married; that she contributed nothing in money or personal earnings towards the accumulation of the property now owned by this defendant.

Defendant further alleges that at the time of his said marriage with the said plaintiff he was the owner in his own name of the property in the city of W., that was exchanged for the property described in plaintiff's petition, which property was of equal value to the property described in plaintiff's petition and for which said property plaintiff contributed nothing for the purchase price thereof.

Wherefore defendant prays that the marriage supposed to have been consummated between plaintiff and defendant be set aside and held for naught, and that said marriage contract between plaintiff and defendant be set aside and held void and that he may be divorced from said plaintiff and that he may be decreed to be the owner of all the property now owned and held by him and also that he may be decreed to be the owner of the property now in the name of plaintiff and that the said plaintiff be adjudged and decreed to have no interest, right or title to any of the said property and for such other and equitable relief as is just and proper.¹

¹ From form in record in *Werner v. Werner*, 59 Kan. 399.

A denial in the language of the petition that the defendant denies that said marriage was unlawful and wrongful, and denies that he has cohabited with L. W. S., etc., in a state of adultery, is not a denial of the cohabitation. *Smith v. Smith*, 19 Neb. 706.

Form of answer to a petition alleging abandonment and desertion. *Dickerson v. Dickerson*, 26 Neb. 318.

A general denial is a good plea to an allegation of adultery. *Oades v. Oades*, 6 Neb. 304.

A cross petition asking for affirmative relief may be filed by the defendant. *Berdolt v. Berdolt*, 56 Neb. 792.

CHAPTER LXXX.

EJECTMENT.

829. Answer in ejectment setting up title under a tax deed and bar of statute of limitations.
830. Answer claiming rightful possession.

829. ANSWER IN EJECTMENT SETTING UP TITLE UNDER A TAX DEED AND BAR OF STATUTE OF LIMITATIONS.

Defendants B. F. G. and A. G., for second answer, say: That at the time this suit was commenced said defendants were in the actual possession of the premises in plaintiffs' petition described, and had been for more than five years prior to the commencement of this action in the continuous and uninterrupted possession of said described premises, under and by virtue of a certain tax deed of said premises made, acknowledged and delivered to one J. D. V., and his assigns, under and from whom these defendants have possession and title to said premises, which said tax deed is dated
....., 19.., and was duly filed for record in the office of the register of deeds of O. county, K., on
....., 19.., and recorded in tax deed record "A" on page
in said office. A copy of which said tax deed is hereto attached, marked "exhibit A" and made a part hereof. And that if said plaintiffs ever had any cause of action against said J. D. V., or these defendants, that the same was, at the commencement of this suit, and also at the time mentioned in paragraph 1 of plaintiffs' petition, completely barred by section 141 of the tax laws of 1876 (Compiled Laws of Kansas, 1885, ch. 107, sec. 141), because this action was not commenced within five years from the time of recording the said tax deed.¹

¹ Sustained on demurrer, *Martin v. Garrett*, 49 Kan. 131.

330. ANSWER CLAIMING RIGHTFUL POSSESSION.

Defendants for answer admit that they are in possession of the premises described in the plaintiffs' petition, and aver that they are lawfully entitled to the possession thereof; and deny each and every other allegation in said petition contained.²

² Form in *Wilkins v. Tourtellott*, 42 Kan. 176, 177.

What answer shall contain. Cob. Ann. Stat. Neb. 1911, sec. 1630, Civ. Code, sec. 627; Gen. Stat. Kan. 1909, sec. 6215, Civil Code, sec. 620; Comp. Laws of Okla. 1909, sec. 6123.

Under a general denial the defendant may prove an equity, which negatives the plaintiff's right to the possession. *Dale v. Hunneman*, 12 Neb. 221.

All defenses, legal and equitable, may be proven in evidence under a general denial. *Hurst v. Sawyer*, 2 Okla. 470.

A defendant in the actual occupancy of land, may show under a general denial that he is the equitable owner, and thus defeat an action brought by the holder of the legal title to establish his ownership and recover possession of the property. *Pinkham v. Pinkham*, 61 Neb. 336.

Under a general denial, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. He may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action. *Staley v. Housel*, 35 Neb. 160; *Chicago, R. I. & P. R. Co. v. Welch*, 83 Neb. 106.

The defendant may interpose any defense, legal or equitable, the effect of which is to negative the plaintiff's right of possession. *Wanser v. Lucas*, 44 Neb. 759.

Under a general denial the defendant may show, by any legal evidence which he may have, that he is the owner of the land in controversy. *Hall's Heirs v. Dodge*, 18 Kan. 277; *Mastin v. Gray*, 19 Kan. 458, 468.

It is sufficient in the defendant to deny generally the title alleged in the petition; and under such a denial, he may prove any fact tending to show that plaintiff has not the title, or right of possession. *Wicks v. Smith*, 18 Kan. 508; *Mitchell v. Insley*, 33 Kan. 654, 658.

Under a general denial a defendant may, for the purpose of defeating the plaintiff's title, show a paramount title in himself, provided such title carries with it the right of possession, whether such title is legal or equitable, and whether the plaintiff's title is legal, or equitable. *Clayton v. School District No. 1*, 20 Kan. 256; *Armstrong v. Brownfield*, 32 Kan. 116.

An answer denying plaintiff's title, averring title in the answering defendant, and alleging that defendant's title had been divested by legal proceedings and a judicial sale, and that the purchaser had been put in possession and defendant ousted, amounts to a disclaimer of title and a denial of possession. *Carson v. Dundas*, 39 Neb. 503.

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Where defendant files an answer disclaiming all right, title, interest and possession in the premises, judgment should be entered on the pleadings in favor of the plaintiff. *Kansas Pac. Ry. Co. v. McBratney*, 10 Kan. 313.

Form of answer denying that plaintiff had any legal or equitable estate in the property. *Meskimen v. Day*, 35 Kan. 46.

Adverse possession may be proved under a general denial. *Murray v. Romine*, 60 Neb. 94; *Link v. Campbell*, 72 Neb. 310; *Oldig v. Fisk*, 53 Neb. 156.

Under an answer denying plaintiff's title and right of possession to the premises, the defendant may show title in himself by adverse possession. *Fink v. Dawson*, 52 Neb. 647.

A denial of plaintiff's ownership on a certain date, and plea of title in defendant by adverse possession, does not put in issue plaintiff's title prior to the certain date of the denial of plaintiff's ownership. *Knight v. Denman*, 68 Neb. 383.

Adverse possession defined. *Chicago, B. & Q. Ry. Co. v. Schalkopf*, 54 Neb. 448; *Weeping Water v. Reed*, 21 Neb. 261; *Lewan v. Heath*, 53 Neb. 707; *Twohig v. Leamer*, 48 Neb. 247; *Webster v. Lincoln*, 56 Neb. 502; *Dredla v. Patz*, 78 Neb. 506; *Baty v. Elrod*, 66 Neb. 735.

An equitable defense may be interposed in an action in ejectment, but one who seeks the intervention of a court of equity must offer to do equity before he is entitled to equitable relief, whether he be plaintiff or defendant. *Union Stock Yards Nat. Bank v. Day*, 79 Neb. 845.

A defendant may show, by his pleading, that he is the equitable owner of the property and entitled to affirmative relief. *Sutton v. Sutton*, 60 Neb. 400.

In an action by the vendee against the vendor, the only defenses presented by the answer were a general denial of the allegations of the petition, and a plea of the statute of limitations. On the trial defendant sought to prove that he had not been paid the consideration for which he sold the land. The testimony was excluded, as no equities were presented by the answer. *Colvin v. Republican V. Land Ass'n*, 23 Neb. 75.

An equitable defense may be set up by the defendant. *Frazier v. Jeakins*, 9 Kan. App. 850; *Goodman v. Nichols*, 44 Kan. 22; *Meadors v. Johnson*, 27 Okla. 544.

Where the defendant seeks by his answer to obtain a decree quieting his title, he must affirmatively allege in such answer, not merely that he is the owner, and in possession, but also that plaintiff is making an adverse claim. *Allen v. Douglass*, 29 Kan. 293.

Where the answer of the defendant put in issue the title of the plaintiff, but alleged no equitable defense, a finding and judgment for the plaintiff upheld, notwithstanding there was evidence which, under proper allegations, would have tended to establish an equitable defense. *Uppfalt v. Nelson*, 18 Neb. 533.

Affirmative relief. If a defendant seek affirmative relief, such as to enforce a contract which does not give him the right to the possession,

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but does give him the right to demand a specific execution of the contract, upon which the right to continue in possession depends, he must plead the facts entitling him to such relief. *Dale v. Hunneman*, 12 Neb. 221.

Where defendant in his answer in addition to a general denial states that he is in possession of the land, and claims to be the owner thereof by virtue of a tax deed and asks that his title thereto may be quieted against plaintiff, that part of his answer claiming title in himself and asking affirmative relief is a counterclaim. *Venable v. Dutch*, 37 Kan. 515.

In an action of ejectment an offset for board and maintenance of the plaintiff by the defendants cannot properly be introduced; it being pleaded merely as an account and not shown to have any direct connection with plaintiff's cause of action for possession of land and for rents and profits. *White v. Whitney*, 68 Neb. 739.

Where the defendant prays for affirmative equitable relief and pleads facts entitling him thereto such issues are triable to the court without a jury. *Card v. Deans*, 84 Neb. 4.

Form of answer in action setting up affirmative defenses. *Moore v. O'Dell*, 27 Okla. 194.

Sufficient answer setting up contract to purchase and tender of purchase money. *Chandler v. Neil*, 46 Kan. 67.

Certain defects in an answer which should be reached by motion, and not by demurrer. *Stringfellow v. Alderson*, 12 Kan. 95.

Where a new or another title is obtained by the defendant during the pendency of the action, this title, to be of any benefit, must be asserted in the action before judgment is rendered. *Hentig v. Redden*, 46 Kan. 231.

Amended answer. It was held not to have been an abuse of discretion for the court to allow an amended answer to be filed. *Robertson v. Lombard*, 73 Kan. 779.

CHAPTER LXXXI.

FRAUD AND DECEIT.

830a. Answer to action for damages by reason of fraudulent representations made as to soundness of a horse sold.

830a. ANSWER TO ACTION FOR DAMAGES BY REASON OF FRAUDULENT REPRESENTATIONS MADE AS TO SOUNDNESS OF A HORSE SOLD.

Now comes defendant and for answer to plaintiff's petition filed herein admits that at the time he sold said horse to plaintiff he believed said horse was sound and that he represented the horse sold to plaintiff to be sound and that he had no information or knowledge of the diseased condition of the horse at the time the sale was made.¹

¹ **Fraud, as a defense to an action on contract,** cannot be pleaded in general terms; the specific acts constituting the fraud must be set forth. *Fire Extinguisher Mfg. Co. v. Perry*, 8 Okla. 429; *Barber Asphalt Pav. Co. v. Botsford*, 56 Kan. 532.

Where fraud, misconduct or mistake is relied upon as a ground for setting aside an appraisal of lands duly made by appraisers selected in accordance with the agreement of the parties, it must be pleaded. *Guild v. Atchison, Topeka, and Santa Fe R. R. Co.*, 57 Kan. 70.

To make fraudulent acts available as a defense to an action, they must appear to have prejudiced him who pleads them. And in the absence of averment and proof to that effect, fraud cannot be presumed to have been injurious. *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192.

CHAPTER LXXXII.

GUARANTY.

831. Answer to an action on a guaranty.

831. ANSWER TO AN ACTION ON A GUARANTY.

The defendant answers the petition as follows:

1. That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and therefore denies the same.

2. The defendant, further answering, admits that the C. Bros. Mfg. Co. sold and furnished to the said A. C. L. on or about , 19.., some goods and merchandise; and further admits that on the day of , 19.., he executed the guaranty mentioned in the petition, of which "exhibit A" is a copy.

3. This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of C. Bros. Mfg. Co. and continued to carry on said business and to supply the customers of said C. Bros. Mfg. Co., and cannot admit, and therefore denies the same.

4. The defendant, further answering, denies that the plaintiff sold and furnished said L. goods and materials as alleged in said petition, and denies that said alleged sales were made to said L. with the knowledge and consent of the plaintiff and at his request, and denies that the defendant requested the plaintiff to sell any goods whatever to said L., or ever in any manner whatever agreed to become liable for the same, and denies that there is due the plaintiff the sum of dollars from said L., or any part thereof.

And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever.

Wherefore the defendant, having fully answered said pe-

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tition, prays to be hence dismissed with his reasonable costs.¹

¹ Form in *Crane v. Specht*, 39 Neb. 123.

Denial of. In an action on a written guaranty indorsed upon a promissory note, the failure to file affidavits denying the execution of such instrument or the indorsement, admits conclusively the execution of the instrument, and the guaranty indorsed thereon. *Eggan v. Briggs*, 23 Kan. 500.

Where the petition in an action on a guaranty of payment of a note and interest coupons by one other than the payee alleges that the plaintiff is the owner and holder of the note and coupons, but does not allege the execution of a written indorsement of the same, an unverified general denial puts the ownership of the paper in issue. *Southern Kansas Farm Loan and Trust Co. v. Barnes*, 63 Kan. 548.

CHAPTER LXXXIII.

INJUNCTION.

832. Answer in action to restrain the continuance of the manufacture of asphaltum alleged to be a nuisance.

832. ANSWER IN ACTION TO RESTRAIN THE CONTINUANCE OF THE MANUFACTURE OF ASPHALTUM ALLEGED TO BE A NUISANCE.

Defendant admits that it is a corporation, duly organized and authorized to do business in This defendant has no knowledge or information sufficient to form a belief whether or not plaintiff owns or occupies the property described in his petition or whether he occupies the same as a residence for himself and family.

This defendant admits that since the early part of, 19.., it has been engaged in the preparation of asphaltum for paving purposes at defendant's temporary plant located upon railway cars on a switch or railway side track on property of the W. Ry. Co. leased to defendant, on the north side of the W. Ry. tracks near D. and T. avenues in the city of Defendant has no knowledge or information sufficient to form a belief as to the distance between its plant and the premises alleged to be owned or occupied by the plaintiff.

Defendant denies that in the preparation of asphaltum at defendant's plant aforesaid, any noxious, offensive or deleterious gases or fumes have been or are generated or given off so as to be carried to or over plaintiff's premises, or in such manner as to be offensive or to constitute a nuisance in any respect or form.

This defendant further avers that at all times stated in the petition it operated said plant with the utmost care to avoid the generation of any odors, gases or fumes or the giving off thereof, and this defendant has not allowed, at any

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time, any odors, gases or fumes to be given off by said plant except such as were strictly necessary and unavoidable in the manufacture of said material for its city contracts above mentioned, and as required thereby, and any fumes, odors or gases which may have escaped from said plant while operated by defendant were only such as were necessary and unavoidable in preparing the asphaltum for use for the construction of streets therewith in manner and form as required by said ordinances and by said contracts between defendant and said city as above mentioned.

This defendant denies that said plant or the operation thereof is either a public or a private nuisance; and it avers that it has the permission of the Municipal Assembly to manufacture said asphaltum preparation for the public work aforesaid in manner and form as aforesaid by reason of the said municipal ordinances authorizing said work, and under which ordinances said city has duly let to this defendant contracts to do said work in the manner above described, and the duly authorized officials of said city have required said treatment of asphaltum by defendant to be done as above described in this answer.¹

¹ **Form of answer** in action praying for an injunction restraining the confirmation of a sale of the sheriff under a foreclosure proceeding. *Meyers v. Jones*, 61 Kan. 191, 204; 59 Pac. 275.

In an action by the abutting lot-owners to enjoin the collection of an assessment for street improvements, which is alleged to have been made without any authority whatever, an answer which sets forth that the plaintiffs had full knowledge of the commencement and progress of the work, that they made no objection thereto, but at all times openly encouraged the same, but does not set forth that the work was done under any kind of authority whatever, or that any person ever intended or expected, or even suspected, that the cost of the work would be charged against the abutting lot owners, does not state facts sufficient to constitute a defense to the plaintiff's action. *Gilmore v. Fox*, 10 Kan. 383.

CHAPTER LXXXIV.

INSURANCE.

- 833. Answer to an action on a fire insurance policy setting up a breach of a warranty in the policy.
- 834. Answer in action on fire insurance policy setting up refusal of the plaintiff to arbitrate the loss as provided for in the policy.
- 835. Answer in action on fire insurance policy alleging alterations made in the building without notice to the defendant.
- 836. Answer in action on fire insurance policy, alleging that the fire was caused by the willful and intentional act of plaintiff.
- 837. Answer in action on an insurance policy alleging cancellation of policy.
- 838. Answer to an action on a fire insurance policy alleging that certain conditions of the policy requiring an itemized inventory had not been complied with.
- 839. Answer to action on a fire insurance policy alleging the failure to use reasonable effort during the progress of the fire to prevent destruction of the goods.
- 840. Answer in action on a life insurance policy setting up misrepresentations in the application for insurance—Tender of premiums paid.
- 841. Answer in an action on life insurance policy issued, but not delivered to the insured or beneficiary before death, alleging as a defense no liability before delivery of policy—Tender of sum paid.
- 842. Answer in an action on insurance policy setting up fraudulent representations made in securing the issuance of the policy.
- 843. Answer in an action on a fraternal benefit certificate alleging misrepresentation and untrue answers made in the medical examination.
- 844. Answer in action on a fraternal benefit certificate setting up failure to comply with the conditions of the law and failure to furnish proofs of death.
- 845. Answer in action on a fraternal beneficiary certificate setting up contract to be governed by the laws enacted after the issuance of the certificate, and alleging death by suicide, rendering the certificate void under the laws in force at the time of the death.
- 846. Answer in action on an accident insurance policy setting up that death resulted from the fact that the insured exposed himself to danger—Tender.

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**833. ANSWER TO AN ACTION ON A FIRE INSURANCE POLICY
SETTING UP A BREACH OF A WARRANTY IN THE POL-
ICY.**

Now comes the defendant in the above cause and denies each and all the allegations in plaintiff's petition.

For further answer herein defendant says that it did not at any time, through any of its agents, when the policy sued on in this action was written and issued, or prior thereto, agree to insure any of the lumber for which suit is brought herein; that the lumber burned was situated in a mill belonging to the plaintiff and under the same roof with said mill, and the agents of defendant did not agree at any time to insure the lumber in said mill nor in any sheds adjoining the same, but covered lumber in yard only and such sheds as were not within prohibited space hereafter mentioned.

Defendant further says that under and by virtue of a clause known in said policy as a lumber space clause which was a warranty on the part of the assured, the assured warranted that a continuous clear space of feet should always be maintained between the lumber insured and any mill or other manufacturing establishment, else the policy should be void; that this lumber space clause aforesaid was inserted in and pasted on the face of the policy sued on in this cause, and the assured accepted said policy with said lumber space clause in the same, and knew that it existed as a part of said policy. Defendant says that notwithstanding said clear space clause, plaintiff did not maintain a space of feet between the lumber which was burned and its manufacturing establishment, which consisted of planing mill and saw mill, and the same being operated at the time by the plaintiff for the purpose of manufacturing and planing lumber. The defendant says that the agents of the defendant company had no authority to issue policies of insurance on lumber without inserting said clear space clause, and were specially prohibited by said company from doing so. That by the terms of the policy of insurance sued on in this case the agents of the defendant are prohibited from waiving any clause or provision which amounts to warranty and which, if not observed, would

render the policy void. The defendant further says that if any agreement was made between any of its agents and the plaintiff whereby the lumber in question should be covered by the policy herein sued on, said agreement was merged into and destroyed by the insertion of said clear space clause in said policy; because, defendant says that all the lumber burned and for which suit is brought herein, was within the prohibited limits of said lumber space clause and was not feet from the mill.

Wherefore, defendant prays to be dismissed without day, and have judgment for its costs.¹

¹ Form in *Liverpool, etc., Ins. Co. v. Richardson Lumber Co.*, 11 Okla. 585.

General averments. Where the answer filed to the petition puts in issue the execution and delivery of the policy, the defendant thereby waives the terms of the policy relating to the preliminary proof of loss. *Western Home Ins. Co. v. Richardson*, 40 Neb. 1; *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 661.

A breach of the contract, such as incumbering the property, is a matter of defense to be pleaded and proved by the company, and it is not incumbent upon the insured to negative the fact in the first instance either in pleading or proof. *Farmers & Merchants Ins. Co. v. Peterson*, 47 Neb. 747.

Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense. *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451.

A condition in a policy of insurance fixing the location of the property insured may be waived by the company, but such waiver must be pleaded, to avail the insured. *Burlington Insurance Co. v. Campbell*, 42 Neb. 208.

An answer alleging that the fire was caused by the culpable negligence and carelessness of the assured, is no defense, where no facts are set forth tending to show that the culpable negligence was willful or fraudulent. *Phenix Insurance Co. v. Sullivan*, 39 Kan. 449.

Where an insurance company in its answer denies that it entered into a contract for the issuance of a policy of insurance on plaintiff's property in the usual or in any other form, such company cannot be permitted to offer in evidence a blank policy of the usual form for the purpose of showing the existence of certain conditions, restrictions, and warranties, with a view to showing such breaches thereof as, by the terms of the policy, operated to render it void. *Phenix Ins. Co. v. Slobodisky*, 53 Neb. 782.

Where the defendant seeks to show a forfeiture of the policy he must plead the ground of forfeiture which he relies upon. *Queen Insurance Co. v. Excelsior Milling Co.*, 69 Kan. 114.

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834. ANSWER IN ACTION ON FIRE INSURANCE POLICY SETTING UP REFUSAL OF THE PLAINTIFF TO ARBITRATE THE LOSS AS PROVIDED FOR IN THE POLICY.

1. Defendant further alleges that said policy of insurance contains the following conditions and agreements, namely: If differences of opinion arise between the parties hereto as to the amount of loss or damage, that question shall, at the written request of either party, be referred to two disinterested and competent men, each party to select one, who shall ascertain, estimate, and appraise the loss or damage; and in case of disagreement, the two so chosen to select a third, who shall act as an umpire on disputed points only, and their award in writing, duly sworn to, shall be binding on the parties hereto as to the amount of said loss or damage, but no appraisal or agreement for appraisal shall be construed as evidence of the validity of said policy or the company's liability therein; and each party to pay their own appraiser and one-half the umpire's fee.

2. The defendant further alleges that in accordance with said agreement and conditions contained in said policy the defendant, after said fire, in writing, notified and requested the plaintiff to submit the differences of opinion between the plaintiff and this defendant, in relation to the amount of loss or damage which the plaintiff had sustained, to two disinterested and competent men, in accordance with the terms of said policy, to ascertain an estimate and appraise the said loss or damage, and requested the plaintiff to notify this defendant of the person of whom the plaintiff had selected to act as appraiser in that behalf; that thereupon the plaintiff did select an appraiser and notified this defendant of said fact, whereupon this defendant selected one F. W. H. of D., Nebraska, to act as its appraiser and notified the plaintiff of that fact; that within a few days thereafter, and before any step had been taken by the plaintiff or defendant, or by the appraisers so appointed, to make any appraisal of said loss or damage, this defendant was informed that the said H. was not a disinterested appraiser, whereupon the defendant, at once, on the day of, 19..., notified the plain-

tiff in writing that this defendant withdrew the name of F. W. H. to act as its arbitrator, and that it would within a reasonable time appoint another person to act as its arbitrator as aforesaid; that three days afterwards, to-wit, on the day of, 19.., this defendant notified the plaintiff that it had selected one J. W. to act as its appraiser instead of said H.; that days later, to-wit, on the day of, 19.., this defendant appeared at D., Nebraska, with the said appraiser and notified the plaintiff that it was ready and willing to proceed at once to said appraisal, but the plaintiff, in violation of the terms, conditions, and agreements contained in said policy, failed, neglected, and refused to proceed with the appraisal, or to enter into any agreement for any future day upon which to appraise said loss or damage, if any, to said property; that subsequently thereto, to-wit, in the latter part of, 19.., this defendant again demanded of the plaintiff an arbitration of said loss and damage to said property, but the plaintiff again refused to enter into said appraisal; and the plaintiff had at all times since the said date refused to enter into any appraisal or arbitration of the amount of loss or damage which the plaintiff may have sustained by reason of said fire, by means whereof the defendant has been unable to ascertain or determine the actual amount of said plaintiff's loss or damage by fire under said policy; but the defendant is informed and believes that the actual loss and damage sustained by the plaintiff under said policy does not exceed the sum of dollars, and that by the terms of said policy the defendant would not in any event be liable for more than three-fourths of said amount, to-wit, the sum of dollars, but the defendant alleges that by reason of the failure and refusal of the plaintiff to have the loss and damage by said fire appraised as required by said policy, prior to the commencement of this suit, said suit was at the time of its commencement premature.

3. The defendant further alleges that the said policy of insurance contains the following agreements, restrictions, and limitations, to-wit: (here copy).

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4. The defendant further alleges that no appraisalment or award has been made fixing the amount of plaintiff's claim under said policy, although the same has been requested in writing by the defendant as hereinbefore set forth.

Wherefore the defendant prays that the plaintiff's action be dismissed and the defendant recover its costs.²

835. ANSWER IN ACTION ON FIRE INSURANCE POLICY ALLEGING ALTERATIONS MADE IN THE BUILDING WITHOUT NOTICE TO THE DEFENDANT.

Further answering defendant alleges that said policy was issued upon a written and printed application therefor, made and signed by M. M., wherein it was agreed and warranted that if the conditions and circumstances were changed or risk increased during the term of said policy said insured should notify the company immediately of the same. Otherwise said policy to be void. Defendant alleges that after said policy was issued and before the fire mentioned in the petition and to-wit, on the day of, 19.., a fire occurred in said building which was originated through the flue thereof, whereby said building was slightly damaged; that after the fire the said insured caused certain changes to be made in said building which weakened the flue and increased the risk of fire in said building; that it was the duty of plaintiff to have notified this defendant of said fire and have informed defendant of the changes made in said building which increased the said risk as aforesaid; but notwithstanding it was the duty of plaintiff to have so notified defendant, plaintiff never did at any time previous to the fire mentioned in the petition, give defendant any notice of said first fire or of said changes of said building, by reason whereof defendant says plaintiff is not entitled to recover.

836. ANSWER IN ACTION ON FIRE INSURANCE POLICY, ALLEGING THAT THE FIRE WAS CAUSED BY THE WILLFUL AND INTENTIONAL ACT OF PLAINTIFF.

Further answering, defendant alleges that the fire mentioned in the petition, which damaged said property, was

² Form in Home Fire Ins. Co. v. Bean, 42 Neb. 537, 542.

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caused by the willful and intentional act of the plaintiff, for the purpose of destroying said property and of defrauding this defendant.

837. ANSWER IN ACTION ON AN INSURANCE POLICY ALLEGING CANCELLATION OF POLICY.

Defendant for answer to plaintiff's petition says:

1. It admits that it is a corporation as alleged in the petition.

2. Defendant says that on , 19.., it did by its agents in the city of execute and deliver to the A. B. B. & A. E. Co. a policy of insurance No. of that date whereby it agreed to insure said A. B. B. & A. E. Co. against loss or damage by fire to the amount of dollars on the property described in said policy for one year from noon of , 19... That at the time said policy was delivered to said insured, no premium was paid therefor by insured nor was any premium or consideration paid therefor at any time by insured or by any one for it and defendant alleges that at the time said policy was delivered to insured, to-wit, on , 19.., it was agreed and so expressed in the face of said policy that the same should not take effect until noon on the day of , 19.., and it was further then and there agreed by and between said insured and defendant through its said agents that before said policy should take effect defendant's said agents would communicate with defendant and ascertain whether or not it would carry said risk and said insured then and there agreed that if the defendant declined to carry said risk it would surrender said policy to this defendant. Defendant alleges that its said agents did communicate with it to ascertain whether or not it would carry said risk and immediately upon receipt of said communication this defendant advised its said agents that it would decline to carry said risk and that on , 19.., in the forenoon before said policy had taken effect, defendant's agents in the city of did inform and notify said insured that this defendant had declined to carry said risk and said policy was afterward in

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compliance with said agreement and understanding, delivered and surrendered to this defendant, so that defendant alleges said policy never became effective and this defendant never assumed any liability thereunder.

3. Further answering defendant alleges it is provided in said policy as follows: "This policy shall be canceled at any time at the request of the insured or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." Defendant alleges that no premium was ever paid by insured or by anyone for it for said policy; that on
....., 19.., defendant duly notified said insured that it would decline to carry said risk and that said policy was canceled and it demanded of insured the surrender of said policy; that on
....., 19.., the said insured did, in compliance with defendant's request, surrender and deliver to it said policy, so that all liability of defendant thereunder, if any ever existed, which it denies, thereupon ceased and determined and plaintiff is not entitled to recover.

5. Further answering, defendant denies each and every allegation, matter, fact and thing in the petition alleged not herein expressly admitted.

838. ANSWER TO AN ACTION ON A FIRE INSURANCE POLICY ALLEGING THAT CERTAIN CONDITIONS OF THE POLICY REQUIRING AN ITEMIZED INVENTORY HAD NOT BEEN COMPLIED WITH.

Further answering, the defendant alleges it is provided in said application and policy that the applicant shall take a complete itemized inventory of any stock of goods insured, at least once a year, during the life of the policy, and unless such inventory has been taken within twelve months prior to the date of the policy, the same shall be taken within thirty days after the date of the policy or the policy shall be null

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and void from such date. The applicant shall keep a set of books which shall clearly and plainly present a complete record of all business transacted, including all purchases, sales and shipments both for cash and credit from the date of inventory provided in the first policy. The applicant shall keep such books and inventories and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night and at all times when the building mentioned in the policy is not actually open for business, or failing in this, the applicant shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building, and if the affiant, or applicant fails to do so, said policy shall be null and void.

Defendant alleges that plaintiff failed to comply with said conditions in said policy in this, that it did not take and preserve an inventory or inventories as required by said policy; that it did not keep a set of books, which clearly and plainly presented a record of all business transacted, including all purchases, sales and shipments, both for cash and credit, as required by said policy, and did not keep such books and inventories in a fireproof safe at night, or when said building was not actually open for business, or in some place not exposed to a fire, which would destroy said building. That the fire mentioned in the petition occurred at a time when said store was not open for business and in the nighttime, by reason whereof defendant says plaintiff is not entitled to recover.

839. ANSWER TO ACTION ON A FIRE INSURANCE POLICY ALLEGING THE FAILURE TO USE REASONABLE EFFORT DURING THE PROGRESS OF THE FIRE TO PREVENT DESTRUCTION OF THE GOODS.

Further answering, defendant alleges that it was the duty of plaintiff to have used every reasonable effort at and during the progress of said fire to have prevented the destruction of said goods from fire and to have saved as many of said goods as possible and to have preserved them after the fire. Defendant alleges that at the time of said fire, plaintiff, by the exercise of reasonable diligence might, and could have

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saved a large quantity of said goods, but that he recklessly and willfully failed to do so and knowingly permitted other people to enter said store while said fire was in progress and take and remove therefrom a large quantity of said goods and keep and retain same for their own, by reason whereof plaintiff is not entitled to recover.

840. ANSWER IN ACTION ON A LIFE INSURANCE POLICY SETTING UP MISREPRESENTATIONS IN THE APPLICATION FOR INSURANCE—TENDER OF PREMIUMS PAID.

Further answering said petition, defendant says that on or about the day of, 19.., said E. McG. aforesaid, and the person mentioned in plaintiff's petition, made and signed a certain application in writing, dated on said day, and signed by said E. McG. at the city of, ..., and same were presented to defendant company, wherein and whereby a policy of insurance in the sum of dollars, upon the life of said E. McG., and for the benefit of his estate, was applied for, which said application was sent to the home office of defendant company in, and there, by the proper officials of defendant company, the same was approved, the defendant relying upon the statements, representations and warranties in said application contained.

Defendant says the policy filed with the petition of plaintiff, upon which his action is based, was issued solely on the faith of said application which, by the terms thereof, and of said policy, is made a part of the contract of insurance sued on; and defendant says that said application and the policy issued thereon, contained the entire contract of insurance entered into by defendant with said E. McG., applicant, and said application and said policy aforesaid constitute the only contract of insurance entered into by defendant and said applicant, E. McG.

Defendant says that in said application it was agreed and warranted by said E. McG. as follows: (set out the warranty in the words used in the application).

Defendant says that in said application aforesaid the following questions, among others, were asked and propounded

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to applicant, E. McG., viz.: (set out the questions and the answers relied upon as not being true).

Defendant alleges, and charges the fact to be, that all of said answers hereinabove mentioned as having been made by said E. McG., and reduced to writing, were absolutely false, and made for the purpose of defrauding and deceiving defendant company; that defendant has been informed, and charges the fact to be, that the said E. McG., at the time of making and signing the said application hereinbefore mentioned carried an insurance policy on his life in the P. Insurance Company of N., N. J., for the sum of dollars.

Defendant further says that the said E. McG., on or about , 19.., a few months prior to the signing of said application, was a patient at the Hospital in , suffering with alcoholism, malaria and chronic nephritis; that after having been discharged from said hospital at his own request the said E. McG. was again admitted as a patient in said institution on or about , 19.., suffering with chronic malaria, chronic nephritis and syphilletes seborrhoes, being so confined and treated in said hospital aforesaid till , 19.., when he was for the second time discharged at his own request. That the said E. McG. was, at the time of the making and signing of said application aforesaid, a habitual drinker of intoxicating liquors, a "hanger on" at the saloon over which plaintiff resides, broken down in health, and finally died as the result of his intemperate habits.

Defendant says that had the said E. McG. not made the false statements and material misrepresentations hereinabove mentioned for the purpose of defrauding and deceiving defendant company, defendant would not have issued the policy of insurance sued on in this cause.

Defendant states that there was paid by and for the insured upon the policy sued on the sum of dollars as premiums thereon and the defendant now tenders said amount and pays the same into court.³

³ Form of answer in action on insurance policy setting up misrepre-

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841. ANSWER IN AN ACTION ON LIFE INSURANCE POLICY ISSUED, BUT NOT DELIVERED TO THE INSURED OR BENEFICIARY BEFORE DEATH, ALLEGING AS A DEFENSE NO LIABILITY BEFORE DELIVERY OF POLICY—TENDER OF SUM PAID.

For answer to plaintiff's petition defendant states that on or about day of, 19..., the S. K. mentioned in plaintiff's petition made a written application for a policy of life insurance of defendant, and the same was afterwards forwarded to defendant's home office in the city of for its action thereon; admits that at the time said application was made there was received from said applicant, by one of its agents, J. C., at the city of, ..., the sum of dollars; but expressly denies that said sum of money or any part thereof was received for or on account of premium on policy of insurance, or for any other purpose than is expressly stated in written receipt delivered to and accepted by the said S. K., being the same receipt mentioned in plaintiff's petition and filed in this cause, which said receipt is in words and figures as follows: (copy receipt).

That said C. had no other or further authority to receive said sum for any other purpose than therein expressed. That the character of policy applied for by the applicant contained among other written conditions the following:

"No obligation is assumed by this company upon this policy until the first premium has been paid, and the policy duly delivered nor unless upon the date of delivery the insured is alive and in sound health.

"The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be waived or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or actuary, whose authority for this purpose will not be delegated; no other person has or will be given authority."

sentation in application for reinstatement. *Aetna Life Ins. Co. v. Rehlaender*, 68 Neb. 284.

Misrepresentation as to condition of health. *Northwestern Mutual Life Ins. v. Woods*, 54 Kan. 663.

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That said policy was not delivered to nor accepted by said S. K. nor was there ever any insurance on his life in force thereunder; that the amount so as aforesaid paid to the said C. by the said S. K. prior to the commencement of this action was tendered back to the said C. K., which was refused and is herewith tendered into court for the use and benefit of said plaintiff or whomsoever the court may determine is entitled thereto.

842. ANSWER IN AN ACTION ON INSURANCE POLICY SETTING UP FRAUDULENT REPRESENTATIONS MADE IN SECURING THE ISSUANCE OF THE POLICY.

The defendant, for answer to plaintiff's petition, says:

1. It admits that it issued the policy of insurance sued on.
2. Further answering, defendant alleges that it is provided in said policy, among other things, as follows:

"If the interest of the assured be or become other than the entire, unconditional and sole ownership of the property and if the buildings insured be on ground not owned by the assured in fee simple, then in all such cases, this policy shall be void unless otherwise provided by agreement indorsed hereon."

Defendant alleges that at the time said policy was issued and at the time of the fire the interest of the assured was other than the entire unconditional and sole ownership of the property, and the said building insured stood on ground not owned by the assured in fee simple, without provision by agreement indorsed on said policy, by reason whereof defendant says plaintiff is not entitled to recover.

3. Further answering, defendant alleges that at the time said policy was applied for the said assured falsely stated and represented that said building was worth largely more than dollars, and that it was the intention of the assured to make material repairs to said building, so that the same would be placed in good condition. That at the time said policy was applied for and issued defendant was not familiar with the value or condition of said building, which fact plaintiff well knew. That insured, for the purpose of cheating and defrauding defendant, falsely repre-

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sented that said building was of the value of dollars and falsely represented and stated that it was the intention of insured to make material repairs to said building. That defendant, in issuing said policy, relied upon said representations; that the same were material. That said representations were false and untrue in this, that said building was not worth dollars and did not exceed in value the sum of dollars. That it was not the intention of plaintiff to make repairs on said building, and put the same in good condition, and plaintiff did not, after said policy was issued, at any time make repairs thereon. By reason whereof, defendant says plaintiff is not entitled to recover; that had defendant known that said representations were fraudulent and had the defendant known the real state of facts regarding said property it would not have issued the policy sued upon.

4. Further answering, defendant alleges that said building was insured as a private barn and was to be occupied as such by a careful tenant; that after said policy was issued and without the knowledge of defendant, said building, or a portion thereof, was used as a creamery, and a portion of said building was used as a warehouse and storage house for the purpose of storing a large amount of hay, and a large amount of hay was stored in said building, whereby the risk of loss by fire was greatly increased, of which fact plaintiff had knowledge, so that defendant says plaintiff is not entitled to recover.

5. Further answering, defendant alleges that at the time said policy was issued, and at the time of the fire aforesaid, said property described in said policy was incumbered by a deed of trust to secure the sum of dollars. Which said deed of trust was in full force and not satisfied at the time of the fire aforesaid; that when said policy was issued and ever afterwards, previous to the fire, the plaintiff concealed from defendant the fact that said incumbrance existed upon said property. That said fact so concealed was a material fact with reference to said risk. That if defendant had known of the existence of said deed of trust it would

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not have issued said policy. By reason whereof defendant says plaintiff is not entitled to recover.

6. Further answering, defendant alleges that it now here offers to refund to plaintiff and tenders into court for plaintiff the premium paid on said policy, to-wit: The sum of dollars, and asks, on account of the fraud and misrepresentation of plaintiff hereinbefore stated, that said policy be canceled and for naught held, and having fully answered, asks to go hence with its costs.

843. ANSWER IN AN ACTION ON A FRATERNAL BENEFIT CERTIFICATE, ALLEGING MISREPRESENTATION AND UNTRUE ANSWERS MADE IN THE MEDICAL EXAMINATION.

Defendant states that on or about the day of, 19.., the said R. L. McD. executed and delivered to the defendant his said application for membership in defendant's society and for benefits therein, a copy of which application is hereto attached and marked "exhibit A" and made a part hereof; that in pursuance of the terms and conditions of the said application, and relying upon the statements, warranties and answers therein contained, defendant admitted said R. L. McD. to membership in defendant's society and issued to him its benefit certificate, which is the same benefit certificate herein sued on, to which was attached by the defendant a true copy of the said written application of the said R. L. McD. therefor.

That said application provided that it should be deemed and taken as a part of any contract of indemnity issued to said R. L. McD. in pursuance of its terms. Said application, so executed by said R. L. McD. as a consideration for and a part of the contract herein sued on, contained among other things the following:

"I have verified each of the foregoing answers and statements from 1 to 28 inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete and literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing an-

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swers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the M. W. of A., and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with and conform to any and all the laws of said M. W. of A., whether now in force or hereafter adopted, that my benefit certificate shall be void."

Defendant says that at item 14 of said application the said R. L. McD. was asked "Have you, within the last seven years, been treated by or consulted any physician, or physicians, in regard to personal ailment?" and in answer to said question he, the said R. L. McD., answered, stated and warranted "No." Defendant avers that said answer and statement was not full, complete and literally true, but avers the fact to be that on , 19.., the said R. L. McD. did consult a physician for personal ailment, who prescribed for and treated him professionally on that date and at sundry other times between said , 19.., and the date of his said application.

Defendant further says that at item 16 of said application the said R. L. McD. was asked, "Have you ever had any local disease, personal injury or serious illness?" and in answer to said question he, the said R. L. McD., answered, stated and warranted, "None." Defendant avers that said answer and statement was not full, complete and literally true; but avers the fact to be that prior to the making of said application the said R. L. McD. had been seriously ill with pneumonia, and was during said sickness attended by a physician.

Defendant says that at item 15 of said application the said R. L. McD. was asked, "Are you now of sound body, mind

and health, and free from disease and injury?" and in answer to said question he, the said R. L. McD., answered, stated and warranted, "Yes." Defendant avers that said statement was a continuing warranty; that it was not, at the time it was made, nor at the time the contract applied for was completed by the issuance and delivery of said certificate, full, complete and literally true, as warranted; but avers the fact to be that for weeks prior to the making of the said application, at the time said application was made, and from the time of the making of said application up to the time of the issuance of the certificate herein sued on, the said R. L. McD. was not in sound bodily health, but was suffering from disease, and was at all such times under the professional treatment of a physician or physicians for his own bodily illness. Defendant avers that the false statements made by the said R. L. McD., as aforesaid, were made by him for the purpose of inducing defendant to issue to him the benefit certificate sued on, and did induce the issuance thereof, and that but for such false statements, answers and warranties defendant would not have issued said benefit certificate.

Defendant further avers that the benefit certificate herein sued on as a part of the contract of indemnity between the said R. L. McD. and this defendant contained among other conditions the following:

"This benefit certificate is issued and accepted only upon the following expressed warranties, conditions and agreements:

"1. That the application for membership in this society, made by the said member, a copy of which is hereto attached and made a part hereof, together with the report of the Medical Examiner, which is on file in the office of the Head Clerk, and is hereby referred to and made a part of this contract, is true in all respects, and that the literal truth of such application and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of this society to such member and to his beneficiary or beneficiaries the same as if fully set forth in this benefit certificate.

"2. That if said application shall not be literally true in

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each and every part thereof, then this benefit certificate shall as to said member, his beneficiary or said beneficiaries, be absolutely null and void.

"3. This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in his application to become a member of this society."

Wherefore, etc.

844. ANSWER IN ACTION ON A FRATERNAL BENEFIT CERTIFICATE SETTING UP FAILURE TO COMPLY WITH THE CONDITIONS OF THE LAW AND FAILURE TO FURNISH PROOFS OF DEATH.

And for further answer defendant says that upon the application of G. W., said defendant on the day of, 19.., issued to said G. W. a beneficiary certificate as alleged in said petition; that said certificate was issued to said G. W. in consideration of the payments to be made by said G. W. to the Endowment rank of defendant, of all monthly payments as required, and the full compliance with all the laws governing said endowment rank at that time in force or that might thereafter be enacted. And said certificate further provides as follows:

"And it is understood and agreed that any violation of the within mentioned conditions or the requirements of the law in force governing this rank, shall render the certificate and all claims null and void; and that the said supreme lodge shall not be liable for the above sum, or any part thereof."

Defendant further states that under the laws, rules and regulations of the defendant, adopted on the day of, 19.., sec., article, provides as follows: (set out).

And by section of the same article, it is provided as follows: (set out).

Defendant says that the said G. W. failed and declined to pay the said monthly payments on said certificate after the month of, 19...., and the same became and was forfeited by reason of said failure of said G. W. to pay said monthly payments and the said G. W., by reason of said

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failure to pay said monthly payments, was by said defendant dropped as a member, and he ceased to be a member of said defendant; and defendant further says that the said G. W. did not, as provided for in said section, regain his membership in said defendant by making application, payment of required fees, and surrender of the forfeited certificate. Said certificate became and was null and void, and remained so.

And for further answer defendant says, that in said certificate it is provided that said defendant would pay the amount therein agreed to be paid, upon due notice and proof of death and good standing in the Rank, at the time of death and surrender of said certificate; and that in and by said certificate it is further provided and agreed that said certificate was issued in consideration of all monthly payments as required, and full compliance with all the laws governing the defendant now in force or that may hereafter be enacted; defendant further states that by the laws of said defendant, duly adopted and passed on the day of, 19.., and in force at the time the claim by said plaintiff was made that G. W. had departed this life; it was provided in article, section, as follows: (set out provision as to notice and proof of death).

Defendant states that no notice of the death was ever furnished by plaintiff to defendant, nor was any proof of death made or furnished by said plaintiff to said defendant at the time it is alleged in said petition the said G. W. departed this life. Nor has any notice or proof of death been furnished to the said defendant since said time; defendant states that no proofs of death were furnished by said plaintiff to the board of control of this defendant, nor to this defendant, containing affidavits of the attending physician or physicians, the undertaker who officiated at the time of the death of said G. W., nor did the said beneficiary herein furnish any affidavit at the time nor since it is alleged that said G. W. departed this life.

And for further answer and defense defendant says that by said certificate upon which suit is brought, the defendant agreed to pay to the plaintiff the sum of dollars,

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“upon due notice and proof of death and good standing in the Rank at the time of death, and surrender of this certificate.” And said certificate further provides as follows: (set out).

Defendant states that said provision in said certificate required said notice and said proof of death to be furnished to the defendant within a reasonable time thereafter.

That by said petition it is alleged that the said G. W. died on or about the day of, 19.., and defendant alleges that plaintiff gave no notice of the death of the said G. W. and furnished no proof of death as required by said certificate, until about the time the suit herein was commenced on said certificate, on to-wit: the day of, 19... And so defendant says that the said notice of said alleged death, and the said proof of said alleged death were not due notice and proof, and were not furnished the defendant within a reasonable time after it is alleged the said G. W. departed this life, by reason thereof said certificate became null and void, and no cause of action ever accrued to the plaintiff.

845. ANSWER IN ACTION ON A FRATERNAL BENEFICIARY CERTIFICATE SETTING UP CONTRACT TO BE GOVERNED BY THE LAWS ENACTED AFTER THE ISSUANCE OF THE CERTIFICATE, AND ALLEGING DEATH BY SUICIDE, RENDERING THE CERTIFICATE VOID UNDER THE LAWS IN FORCE AT THE TIME OF THE DEATH.

Further answering, the defendant says that in the contract between the said member and said association it is provided in the application signed by the said P. Z., which is made a part of this certificate, as follows: “I hereby agree that these statements, together with those hereafter made to the examining physician in this application, and the laws of the S. T. of the K. of the M. of the W., now in force or that may hereafter be adopted, shall form the basis of this contract for beneficial membership.” And it is further provided and set forth in said application, “This application and the laws of the S. T. now in force or that may hereafter be adopted are made a part of the contract between myself and the S. T.,

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and I for myself and my beneficiary or beneficiaries agree to conform to and be governed thereby." That the said certificate issued to the member likewise provided that the laws then in force and the laws thereafter to be enacted should become a part of the contract.

Further answering, defendant says that on, to-wit, the day of, 19.., section of the laws of this defendant, duly and legally adopted, became and was in full operation and effect. That said law provides, "When death is the result of suicide within five years after admission, whether the member taking his own life is sane or insane at the time, then the association shall not be liable to the beneficiary in said certificate named." Said laws further provide, "provided that in case of suicide within years after admission, all assessments paid to the S. T. by such member shall be paid back to the beneficiary named in the certificate, and such amount shall be the full amount that can be claimed in any case." That said law was subsequently amended so as to give to the beneficiary in any and all cases of suicide of the member, an amount equal to twice the amount contributed to the life benefit fund by the member during his lifetime, and the laws or by-laws of the defendant were in this condition and so provided at the time of the death of the said member P. Z.

Further answering, the defendant says that the said member, the said P. Z. on the day of, 19.., committed suicide by shooting himself with a pistol. That the said member during his lifetime paid into said association to the life benefit fund, the sum of dollars, and the defendant herein thereby became liable to the plaintiff in the sum of dollars, being twice the amount that was paid in by said member during his membership.

846. ANSWER IN ACTION ON AN ACCIDENT INSURANCE POLICY SETTING UP THAT DEATH RESULTED FROM THE FACT THAT THE INSURED EXPOSED HIMSELF TO DANGER—TENDER.

Further answering, defendant says it admits that O. J. received a wound in his head which caused his death as alleged in plaintiff's petition, but says that, at the time of

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receiving said wound, he had unnecessarily exposed himself to danger and to obvious risks of injury by going to sleep upon the railroad track of the G., C. and S. F. R. R., near the south end of bridge No., near, ...; and that said wound was produced by a train running over said road, striking him in the head; and at the time of receiving said wound he was employed by the railroad company as watchman on said bridge, with the directions to flag all trains passing over said bridge; and that such duties required him to remain awake constantly on watch for all passing trains; that such negligence and unnecessary exposure to danger was the sole and only cause of said accident.

Defendant further alleges that in the performance of his duties as aforesaid as watchman on said bridge, it was his duty to flag all trains going in a northerly direction over said bridge; that for this purpose it was necessary that he remain on the east side of the railroad track, but that he negligently placed himself upon the west side of the track and so near thereto as to be struck by a passing train passing over said bridge running in a northerly direction.

Defendant further alleges that by the terms and provisions of said policy by plaintiff pleaded, any unnecessary exposure to danger or obvious risk of injury by the said O. J., it was agreed between him and the said company that the said defendant should be exempt from liability, should death occur from accident, to an amount beyond the sum of dollars, and that it was further agreed in said policy or contract that any amount or premium unpaid which had been agreed to be paid therein, should be deducted from any liability of the company under the said contract and that there was still remaining due and unpaid, as premium, the sum of dollars.

Defendant further alleges that the said amount of dollars, has been tendered to plaintiff and that he refused to receive and accept the same as payment on said policy, and defendant further hereby tenders the sum of dollars, and submits and agrees that this court may render judgment for that amount; defendant therefore prays to be dismissed of this suit with its cost.

CHAPTER LXXXV.

JUDGMENT.

847. Answer to action on a judgment alleging no service in suit on original judgment, also that note on which judgment was rendered was usurious.
848. Answer to action on a foreign judgment setting up discharge in bankruptcy.
849. Answer to action on a judgment of another state.
847. ANSWER TO ACTION ON A JUDGMENT ALLEGING NO SERVICE IN SUIT ON ORIGINAL JUDGMENT, ALSO THAT NOTE ON WHICH JUDGMENT WAS RENDERED WAS USURIOUS.

For her first defense to plaintiff's petition this defendant alleges: That no summons was served upon her either personally or by delivering a copy thereof at her usual place of residence, in the action set forth in the petition upon which said judgment was obtained, nor did she appear in said action, either in person or by attorney, and that the court had no jurisdiction whatever to render said judgment against this defendant.

2. And for a further and second defense to plaintiff's petition this defendant alleges: That said pretended judgment is alleged to have been founded upon a promissory note, dated , 19.., given by defendants, as this defendant is informed and believes, largely for usurious interest exacted of the co-defendant and husband J. H. by plaintiff's assignor, H. T. J., as cashier of the J. N. B., and which said note was signed by this answering defendant solely as security for her said husband, and was executed solely by her upon the agreement and representation of the payee of said note that said note represented all the indebtedness then existing against said defendants or either of them to said payee, and that said note was to be secured by and paid from the proceeds of a certain chattel mortgage

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then executed by her said husband on a large amount of personal property owned by him, to-wit: (here set out) of the value of more than the amount of said note; that said defendant, relying upon said representations and the faithful performance of the agreement to apply said mortgaged property to the payment of said note, then signed and delivered said note, and said mortgage was then at same time executed and delivered to plaintiff's assignor, to secure the same, and but for said representations and the agreement to execute and deliver said chattel mortgage securing the payment of said note, this defendant would not have executed the same.

And defendant says that all of the foregoing facts were known to plaintiff and plaintiff's assignor at the time of the alleged indorsement of said note to plaintiff, as also at the time of the conversion of said mortgaged property as hereinafter mentioned.

And this defendant further alleges that long after the pretended recovery of the alleged judgment against this defendant, on said note mentioned in plaintiff's petition, to-wit, in the month of, 19.., the plaintiff took possession of said mortgaged property and converted the same to his own use and refused to apply it to pay said note or pretended judgment; and this defendant alleges that said personal property was of value more than sufficient to pay said promissory note and interest and the pretended judgment for the same, and the said personal property or the value thereof should have been by plaintiff applied to satisfy and pay any indebtedness by reason of said note or said pretended judgment. Yet the plaintiff, though often requested, has refused to so apply said mortgaged property or the value thereof.

This defendant further alleges, on information and belief, that said plaintiff, W. B. B., is only the nominal owner of said promissory note and said pretended judgment; that the same was not purchased by him for value or received by him in good faith, but that the same was indorsed to him (if at all) by said H. T. J. without consideration and

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for the purpose of cheating and defrauding this defendant out of her proper and just defense to the same. And defendant alleges that the sole interest in said note and pretended judgment has at all times belonged to said H. T. J., as cashier of said J. N. B.¹

848. ANSWER TO ACTION ON A FOREIGN JUDGMENT SETTING UP DISCHARGE IN BANKRUPTCY.

The above-named W. H. W., by I. E. L., his attorney, for his sole and separate answer in the above cause says: That the said plaintiff ought not to have his said action against this defendant, because he says that the debt upon which the judgment mentioned in plaintiff's petition was rendered was due prior to the day of, 19.., and was created by a contract for cattle bought by defendant from plaintiff; that upon the day of, 19.., a petition for adjudication in bankruptcy was filed by the said W. H. W. in the district court of the United States for the northern district of; that upon the day of, 19.., this defendant, the said W. H. W., was by the said United States district court for the northern district of duly and legally discharged in bankruptcy. A copy of the certificate of discharge is hereto attached, and marked "exhibit A," and made a part of this answer. That during the pending of said bankruptcy, the claim of this plaintiff represented by said judgment was filed, proven and allowed by the court, and the said plaintiff received from said bankrupt's estate the dividends in the same amount and in the same manner as did the other creditors of this defendant in the said bankruptcy proceedings.

Wherefore defendant prays judgment for costs herein.²

849. ANSWER TO ACTION ON A JUDGMENT OF ANOTHER STATE.

And the said T. C. R. and A. R., defendants, now come, and for their answer to the petition of the said J. W. H., plaintiff, allege and say:

¹ Form in *Holliday v. Brown*, 33 Neb. 657.

² Form in *Widner v. Yeast*, 32 Kan. 400.

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1. That they deny each and every allegation and averment in said petition contained.

2. And for a second and further cause of defense to said petition, said defendants say that at the time when said proceedings were commenced as set forth in plaintiff's petition, and at the time when said supposed judgment was rendered as alleged in said petition, they, the said defendants, were citizens of the State of Kansas and were residing therein; and said defendants further allege that they were not served with process in said case, and had no notice whatever of the pendency of said action, and that they never appeared thereto in person nor by attorney, and this they are ready to verify.

3. And for further cause of defense defendants allege and aver that said prothonotary of said court of common pleas had no jurisdiction or authority in law to enter said pretended judgment.

4. And for a fourth cause of defense defendants allege and aver that said court of common pleas had no authority in law to render said pretended judgment.

5. Said defendants further allege and aver that said pretended judgment is void in law.

Wherefore, defendants pray judgment for costs.³

³ Form in *Ritter v. Hoffman*, 35 Kan. 215.

A general denial, as an answer to an action on a judgment, does not put in issue the regularity of the proceedings on which the judgment was based, or the correctness of the judgment. The only inquiry that can be made on such an issue, when the judgment is offered in evidence, is, was such a judgment rendered, and had the court rendering it jurisdiction of the parties and the subject-matter. *Union Pacific Ry. Co. v. McCarty*, 8 Kan. 91.

If payment of a judgment sued on has been made, either voluntarily or by means of an execution, the fact should be pleaded and proved. Payment is always a matter of defense. *Saville v. Schroyer*, 65 Kan. 303.

In an action in this state to enforce the judgment of a sister state the defendant may allege and show that the court had no jurisdiction to render such judgment against him. *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636.

In a proceeding to revive a dormant judgment the defendant, by plea of payment, admits the validity of the judgment sought to be revived. *McCormick v. Carey*, 62 Neb. 494.

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In a proceeding to revive a dormant judgment by motion, the judgment debtor cannot plead as a defense to such motion an independent cause of action existing in his favor against the judgment creditor. *Lashmett v. Prall*, 83 Neb. 732.

An answer filed in connection with an application to open a judgment rendered without other service than by publication, must be full and complete as a pleading by the defendant in the cause. *Williams v. Kiowa County*, 74 Kan. 693.

Upon proceedings to revive a dormant judgment which is valid upon the face of the record, no objections will be heard which seek to go behind the original judgment. *American Freehold Land Mortgage Co. v. Smith*, 84 Neb. 237.

CHAPTER LXXXVI.

LIBEL AND SLANDER.

- 850. Answer alleging the truth of the matter charged as slanderous.
- 851. Answer in action for slander, admitting speaking the words, but alleging they were not intended to apply to plaintiff.
- 852. Allegations of answer in action for slander pleading justification.
- 853. Answer to an action against a newspaper for libel, setting up affirmative matter and denying that the publication was made with malice.

850. ANSWER ALLEGING THE TRUTH OF THE MATTER CHARGED AS SLANDEROUS.

This defendant, further answering the petition of the plaintiffs and the several counts thereof, says: That, at the time of the alleged speaking of the alleged defamatory words set out in said petition and in the several counts thereof, the defendant had good reason to believe, and did believe, and now so charges the facts to be, that on, to-wit, the day of, 19.., and at divers other times before and after said date and prior to said, 19.., the plaintiff A. S. N., then being unmarried, did have carnal communication with and did commit fornication with the said J. S. at the county and state aforesaid. Wherefore this defendant says that whatever words he may have spoken of or concerning said plaintiff were and are true.¹

¹ Answer in libel on slander, statutory provisions. Cob. Ann. Stat. Neb. 1911, sec. 1132; Gen. Stat. Kan. 1909, sec. 5720; Comp. Laws Okla. 1909, sec. 5666.

Constitutional provision. Const. Neb. 1875, Art. 1, sec. 5; Const. Kan. 1859. Bill of Rights, sec. 11; Const. Okla. Bill of Rights, sec. 22.

The truth is a full defense in Kansas in any civil action for slander, as well as for libel. *Mundy v. Wight*, 26 Kan. 173; *Castle v. Houston*, 19 Kan. 417.

The defendant may set up the defenses: First, that he did not use the language imputed to him; and second, that such language is true. The two defenses are not inconsistent with each other, and both may be true. *Cole v. Woodson*, 32 Kan. 272.

851. ANSWER IN ACTION FOR SLANDER, ADMITTING SPEAKING THE WORDS, BUT ALLEGING THEY WERE NOT INTENDED TO APPLY TO PLAINTIFF.

And now comes defendant H. S., and denies each and every allegation contained in plaintiff's petition.

And for a further defense the said defendant, H. S., says that he did say at the time set forth in plaintiff's petition that he (the said defendant) believed that J. H. W., husband of I. A. W., plaintiff herein, was not a married man, and the woman who accompanied him, the said J. H. W., at the said time, was not the plaintiff, I. A. W., but another woman; that on or about the day of, 19.., the said defendant, H. S., became acquainted through the said J. H. W., husband of the plaintiff, I. A. W., that he, the said J. H. W., was a married man, and that the woman who accompanied him, the said J. H. W., was the plaintiff, I. A. W., and wife of the said J. H. W.; whereupon the said defendant, H. S., apologized to the said J. H. W., husband of the plaintiff, I. A. W., for anything and everything said

Defense in mitigation of damages. Where slanderous words, which are *per se* actionable, are spoken in a moment of heat and passion, induced by some improper conduct immediately preceding on the part of the plaintiff, the said circumstances, under which the words were spoken, are not a complete defense to the action for slander, but should be considered by the jury only in mitigation of damages. *Miles v. Harrington*, 8 Kan. 284.

It is not a defense to show that a libelous article was copied from another paper, but it may be pleaded and shown in mitigation of damages. *Sheibley v. Huse*, 75 Neb. 811.

Where it is alleged in a petition that defendant spoke certain words of the plaintiff and their meaning is averred in an innuendo, a statement in the answer by which the defendant admits the uttering of the words as alleged, but further states "that it was not in the sense of nor with the intent to convey the idea" claimed in the petition, is not a denial that the words had the signification averred in the petition. *Barr v. Birkner*, 44 Neb. 197.

The question whether the language spoken was a privileged communication is not raised by a general denial. The privilege must be pleaded. *Hess v. Sparks*, 44 Kan. 470.

Form of answer in action for slander, alleging the truth of the words spoken and pleading want of malice. *McCleneghan v. Reid*, 34 Neb. 472, 474.

by the said defendant, H. S., at the time aforesaid, against the said J. H. W. and his wife, I. A. W., the plaintiff herein.²

852. ALLEGATIONS OF ANSWER IN ACTION FOR SLANDER PLEADING JUSTIFICATION.

The language used, and the matter contained in the paper attached to the plaintiff's petition in this action, which said language and matter is charged in said second cause of action to be defamatory to the plaintiff, is true, in this: That on or about the day of, 19.., the same being the day following the death of W. McK., late President of the United States, the plaintiff, in the presence of and against the protests of a large number of the citizens of F. and vicinity, in S. C. township, in said H. county, in answer to and in connection with expressions of grief on the part of the said citizens of F. and vicinity over the death of W. McK., spoke and uttered the following words: "I'd as lief vote for a damned dog as for McK. He was no better than a damned dog. Any man who sympathizes with his family hasn't any sense," and made use of other words and expressions of like character, and by his demeanor and conduct, as well as by the language that he used, plaintiff showed that he did not in any manner sympathize with the grief felt by the people of F. and vicinity as aforesaid, and that in fact he rejoiced in the death of W. McK. at the hand of the assassin.³

² Form in *Steinbuechel v. Wright*, 43 Kan. 308.

Form of answer in action for slander alleging circumstances under which the slanderous words were spoken. *Barr v. Birkner*, 44 Neb. 197.

³ Form in *Grubb v. Elder*, 67 Kan. 316.

Justification. An answer in an action for defamation of character, pleading justification, must fully meet the defamatory matter pleaded, as explained by the innuendo, but where the innuendo attaches a meaning to the language used not necessarily arising from such language, the justification is broad enough if it pleads that by the demeanor and conduct of the plaintiff at the time the language was used it was understood to be used in the sense set out in the innuendo. *Grubb v. Elder*, 67 Kan. 316.

A plea of justification is good without alleging that the defamatory words were spoken with good motives or for justifiable ends. *Larson v. Cox*, 68 Neb. 44.

853. ANSWER TO AN ACTION AGAINST A NEWSPAPER FOR LIBEL, SETTING UP AFFIRMATIVE MATTER AND DENYING THAT THE PUBLICATION WAS MADE WITH MALICE.

Now comes defendant and admits that it is a corporation and the publisher of the newspaper in the city of St. L., known as the St. L., and admits the publication in said paper of the article set forth in plaintiff's petition on the day of, 19.., but denies that said publication was false, defamatory or libelous of plaintiff in any sense.

And further answering, defendant says that the facts set forth in said article of and concerning plaintiff were true.

And further answering, defendant says that said article set out in the petition was a fair and truthful narrative of the proceedings in the criminal court of the city of in connection with the indictment of plaintiff, and one J. McC., and of the arrest of plaintiff and said McC. thereunder, and explanatory of the charge contained in said indictment, and that said publication was made by defendant in the performance of its duty as a public journalist, and solely for the purpose of giving the public information concerning the administration of public justice in the city of, and that said publication was made after careful investigation and as a matter of news, without any injurious comments and without any malice towards plaintiff; that the said publication was legitimate public news and defendant says that said publication was privileged in the law.

And further answering, and as explanatory of the circumstances under which, and the motives with which the publication complained of in the petition was made by defendant, defendant says that said publication was a fair and truthful narrative of the proceedings in the criminal court of the city of in connection with the indictment of plaintiff and one J. McC., and the arrest of plaintiff and said J. McC. thereunder, and also was explanatory of the circumstances of said arrest and of the charge contained in said indictment, which were of public interest to the citizens of St. L., and that defendant made full and careful investigation from all available sources, including the statements of said indicted

parties, before making said publication, and that the publication was made without injurious comments and without malice.⁴

4 The truth alone in Nebraska is not a complete defense in a civil action for libel, but, if the defendant justifies, he must further allege and prove that he published the alleged defamatory matter with good motives and for justifiable ends. Bill of Rights, sec. 5; *Wertz v. Sprecher*, 82 Neb. 834; *Neilson v. Jensen*, 56 Neb. 430; *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64; *Fordyce v. Richmond*, 78 Neb. 752.

When the defense of the truth of the matter published is made, the defendant must establish the truth of each libelous charge made and published. *Neilson v. Jensen*, 56 Neb. 430.

Generally an answer justifying the publication of an alleged libel on the ground that the statements made are true is specific enough if it gives the plaintiff sufficient notice of what defendant will attempt to prove. *Sheibley v. Fales*, 81 Neb. 795.

(Kansas) the truth of the alleged libelous matter is a complete defense in a civil action for libel. *Castle v. Houston*, 19 Kan. 417.

The defendant, in a civil action against him for libel, may, where the alleged libel is specific, merely answer that the charge is true; but where the charge is in general terms the answer must allege the facts upon which he relies to make out the charge. *Dever v. Clark*, 44 Kan. 745.

If the defendant denies that he published a libel of and concerning plaintiff, he will not be permitted to prove the truth of his publication. *Sheibley v. Nelson*, 84 Neb. 393.

A plea of justification in an action for libel to be a defense requires great certainty of averment and must justify the sting of the very charge alleged; it is not permissible to set up a charge of the same general nature but distinct as to the particular subject. *Bodine v. Times-Journal Pub. Co.*, 26 Okla. 135.

Justification for the publication of a libel must be set up by the defendant. *Russell v. Anthony*, 21 Kan. (450) 329.

Plea of justification. *Castle v. Houston*, 19 Kan. 417.

CHAPTER LXXXVII.

MALICIOUS ATTACHMENT.

854. Answer in action for damages for wrongful attachment setting up former adjudication.

854. ANSWER IN ACTION FOR DAMAGES FOR WRONGFUL ATTACHMENT SETTING UP FORMER ADJUDICATION.

That on the day of, 19.., in the district court of P. county, State of Kansas, said E. & O., the plaintiffs herein, duly filed their petition against L. W. C., one of the defendants herein, setting forth and alleging their right to the immediate possession of the stock of goods and merchandise mentioned and described in the plaintiff's petition herein, and demanding a return thereof and a judgment for the sum of dollars, alleged to have been sustained by reason of the detention; and such proceedings were thereupon had in said suit that said L. W. C. appeared and answered to the petition, and a final judgment was therein rendered; that in said action one of the questions litigated and decided was the amount of damage, if any, which the said plaintiffs had sustained by reason of the detention of the said goods by the said L. W. C.; that in and by a judgment and decree of said court it was adjudged and determined that the said plaintiffs were entitled to the return of the goods mentioned and described in said petition, and that in default thereof for their value therein stated, and that said plaintiffs also have and recover of and from said L. W. C. their costs herein, taxed at \$., which said judgment was fully satisfied and discharged by the return of said goods and chattels, and the full payment of said costs before the commencement of this action; that said plaintiffs utterly failed to recover a judgment for the damages alleged to have been sustained by them in their said petition, or any part thereof.¹

¹ Form in Ellis & Osborn v. Crowl, 46 Kan. 100.

CHAPTER LXXXVIII.

MALICIOUS PROSECUTION.

- 855. Denial that defendant instituted the prosecution.
- 856. Denial of want of probable cause.
- 857. Answer to action for malicious prosecution alleging honest mistake in making affidavit for arrest.
- 858. Alleging defense of advice of counsel.
- 859. Answer setting up the issue of the warrant complained of on the advice of the prosecuting attorney.
- 860. Answer to an action for malicious prosecution for causing the arrest and criminal prosecution of the plaintiff, setting up that the complaint was issued on the advice of the prosecuting attorney, and denying that it was malicious and without probable cause.

855. DENIAL THAT DEFENDANT INSTITUTED THE PROSECUTION.

Defendant denies that he procured or caused said plaintiff to be arrested and prosecuted on the charge of as alleged in plaintiff's petition.

856. DENIAL OF WANT OF PROBABLE CAUSE.

Defendant denies that he maliciously and falsely or without reasonable and probable cause, procured or caused said plaintiff to be arrested and prosecuted on the charge of as alleged in plaintiff's petition.

857. ANSWER TO ACTION FOR MALICIOUS PROSECUTION ALLEGING HONEST MISTAKE IN MAKING AFFIDAVIT FOR ARREST.

That on or about the day of, 19.., the said defendant being in the employ and the agent of the city of O., Kansas, for the U. S. E. Co., an incorporated company doing business as a common carrier, by virtue of said agency and employment there came into the possession of the defendant a valuable package, said to contain the sum of

..... dollars, in money, which package was directed to J. B., O., Kansas, as the owner, and was feloniously and fraudulently obtained from defendant by some person unknown, falsely and fraudulently personating the true owner of said package to said defendant; that defendant alleges that as soon thereafter as he was aware of the perpetration of said crime as aforesaid, by some person unknown, and being informed of the presence of the plaintiff in the city of O., aforesaid, at the time the package was feloniously obtained, and defendant unacquainted with plaintiff, and plaintiff unknown to defendant, defendant, honestly believing that the plaintiff had committed said felony, thereupon made the affidavit referred to in plaintiff's petition, and caused the arrest of the plaintiff on the charge stated in the affidavit set forth. Defendant alleges that he was under an honest mistake, and as soon as aware of the truth of the transaction he caused the plaintiff's discharge from custody.

And further answering, defendant denies each and every allegation in the petition of plaintiff not herein specifically set forth and admitted in the first count of the answer and asks to be dismissed.¹

858. ALLEGING DEFENSE OF ADVICE OF COUNSEL.

Defendant avers that prior to the institution of the prosecution against A. B. mentioned in plaintiff's petition that he consulted with, and sought the advice of, C. D., an attorney at law, duly and legally licensed to practice his profession in the State of and who enjoyed a high reputation as a wise and safe legal adviser in matters relating to the criminal laws of said state and all prosecutions and proceedings thereunder; that defendant did not call on said C. D. in pursuance of a previous fixed determination to commence said prosecution, but defendant avers the fact to be that he consulted with, and sought the advice of, said attorney in

¹ Form in *Clark v. Baldwin*, 25 Kan. 84, 85.

Where the defense is set up that the defendant acted on the advice of his counsel, the answer should show that he stated all the facts to his counsel. *Clark v. Baldwin*, 25 Kan. 84; *Drake v. Vickery*, 81 Kan. 519.

MALICIOUS PROSECUTION.

good faith solely for the purpose of obtaining competent legal advice as to the liability of said plaintiff to criminal prosecution on account of (set out general nature of alleged offense against plaintiff) that prior to the visit of this defendant to said attorney for the purpose aforesaid defendant alleges that he made every reasonable effort to obtain all the facts possible concerning plaintiff's connection and acts relating to said alleged offense; that at the time of said consultation with said attorney as aforesaid defendant communicated to said attorney each and every fact and circumstance within his knowledge and which he had obtained by diligent inquiry as aforesaid, in no wise omitting any thing, bearing on the guilt or innocence of said plaintiff, touching said transaction. That after this defendant had imparted to said attorney full and complete information concerning the matter aforesaid, said attorney then and there advised this defendant that under the criminal laws of a prosecution of plaintiff on account of his acts touching the matter aforesaid was warranted; that thereafter this defendant, in good faith, and solely for the purpose of vindicating the criminal laws of the State of and relying implicitly on the advice of said attorney, procured the arrest and prosecution of said plaintiff; that all of the acts done by this defendant and all acts caused to be done by him in and about the prosecution of said plaintiff were done in good faith, without malice or ill feeling against said plaintiff, for the purpose aforesaid and under the advice of said attorney.

359. ANSWER SETTING UP THE ISSUE OF THE WARRANT COMPLAINED OF ON THE ADVICE OF THE PROSECUTING ATTORNEY.

For further answer the said defendants and each of them upon information and belief, say that the affidavit and information filed against the said plaintiff and referred to in the petition, was filed by the informant therein named under the advice of the prosecuting attorney of L. county, ..., and after the affiant, one J. M., had given to said prosecuting attorney a full and fair statement of all the facts known

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to said M., and that said prosecuting attorney on
....., 19.., on his knowledge, information and belief, and
upon his oath of office, made and filed in said court his affidavit informing the court of L. county, State of
....., that on the day of, 19.., one S. C.
did willfully, unlawfully and maliciously set fire to and
burn a certain house located in the city of A., ..., belonging
to one J. R. W., Jr., of the value of dollars, and
at the same time and place did willfully, maliciously and
feloniously set fire to and burn a certain stock of goods
therein belonging to one H. C., and of the value of
dollars, a copy of which said affidavit of said prosecuting
attorney is hereto attached and made a part hereof, and that
on said affidavit and information of said prosecuting attorney
alone, the alleged said warrant was issued, under which
plaintiff was arrested and prosecuted as alleged in his petition,
and that there was reasonable and probable cause for the filing
of said affidavit and information, but the defendants and each
thereof deny that they or either of them had anything whatever
to do with the filing of either said affidavit or information, and
aver that said affidavit and information were filed, and the said
warrant issued and plaintiff arrested without the procurement or
knowledge of these defendants or any of them, and that neither
they, nor any of them, had any thing whatever to do with the
alleged prosecution of the plaintiff.

**860. ANSWER TO AN ACTION FOR MALICIOUS PROSECUTION
FOR CAUSING THE ARREST AND CRIMINAL PROSECUTION
OF THE PLAINTIFF, SETTING UP THAT THE COMPLAINT
WAS ISSUED ON THE ADVICE OF THE PROSECUTING ATTORNEY,
AND DENYING THAT IT WAS MALICIOUS AND WITHOUT
PROBABLE CAUSE.**

Defendant further states that before he filed the first complaint
against the plaintiff, he consulted with the prosecuting attorney
of D. county, ..., to-wit, G. W. H., with a view to obtain
his advice as to the liability of said plaintiff to criminal
prosecution, and that he communicated to such prosecuting
attorney all the facts within his knowledge, or

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that he might have learned by reasonable diligence on the guilt or innocence of the plaintiff of said crime, and that said prosecuting attorney gave it as his legal opinion that the said plaintiff was liable to criminal prosecution, and that thereupon, defendant decided to institute prosecution against plaintiff, in good faith, and in pursuance of the advice and opinion expressed by the said prosecuting attorney, and that said prosecuting attorney then prepared a complaint for defendant to sign and swear to, and that defendant left said complaint with the prosecuting attorney and had nothing further to do with the matter, except signing the new complaints as hereinbefore stated; that the prosecuting attorney himself, as an official, attended to the preparation of his official informations and the filing of all papers in the cause with the clerk and the procuring the issuance and service of warrant therein.

Defendant states that said prosecution was not malicious and was not without probable cause; that defendant had good reason to believe and did believe the plaintiff guilty of the charge alleged against him in said complaint.²

² Under a general denial, the defendant may show that in setting the prosecution on foot, he acted in good faith, on the advice of the county attorney, after having made a full disclosure of all the material circumstances of which he had knowledge. *Maynard v. Sigman*, 65 Neb. 590.

An answer in the nature of a general denial puts in issue the plaintiff's allegations of malice and want of probable cause. Under such an answer the defendant may introduce any evidence which tends to disprove malice or establish the existence of probable cause. *Hackler v. Miller*, 79 Neb. 206, 209.

The defendant will not be permitted to urge the insufficiency of the complaint on which he caused the plaintiff's arrest as a defense to the action. *Minneapolis Threshing Machine Co. v. Regier*, 51 Neb. 402; *Hackler v. Miller*, 79 Neb. 206, 209; *Bell v. Keepers*, 37 Kan. 64; *Parli v. Reed*, 30 Kan. 534.

Where a person, acting in good faith, and under the advice of counsel learned in the law, mistakenly institutes a prosecution against another person who is not liable and the prosecution fails, the prosecutor does not thereby render himself liable to an action for malicious prosecution, or to any other action. *Dolbe v. Norton*, 22 Kan. 84.

CHAPTER LXXXIX.

MASTER AND SERVANT.

- 861. Answer in action for damages by servant setting up knowledge of the defect on part of plaintiff and contributory negligence.
- 862. Answer in action for damages by servant setting up assumption of risk and contributory negligence.
- 863. Answer alleging contributory negligence.
- 864. Answer that servant assumed risk incident to employment.
- 865. Answer, setting up contributory negligence, in an action by an employee for damages resulting from an injury received while at work on a freight elevator.
- 866. Answer in action against master for damages for death of servant, containing (1) general denial (2) assumption of risk, and (3) contributory negligence.
- 867. Answer averring (1) assumption of risk, and (2) contributory negligence.
- 868. Allegation of contributory negligence and assumption of risk.
- 869. Answer containing general denial and setting up affirmative defenses, first, of contributory negligence, and second, a release obtained from plaintiff.

861. ANSWER IN ACTION FOR DAMAGES BY SERVANT SETTING UP KNOWLEDGE OF THE DEFECT ON PART OF PLAINTIFF AND CONTRIBUTORY NEGLIGENCE.

The defendant for its answer says:

1. That it denies each and every allegation, averment and statement therein contained except such as are hereinafter admitted to be true.

2. Defendant admits that it is and was a railway corporation, as alleged in plaintiff's petition.

3. Defendant avers that if the said C. E. S. received injuries while engaged in the employ of this defendant, which resulted in his death, that said injuries and resulting death were not caused by any fault, negligence or want of care on the part of said defendant, its officers, agents, servants or employees, but that the same was caused by the negligence, omis-

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sion and want of care on the part of the said C. E. S., deceased.

4. That said C. E. S., when he took employment in the service of said defendant, assumed and took upon himself all the risk incident to said employment, and that if he was injured and killed as alleged in plaintiff's petition it was the result of an ordinary risk, which he, as an employee of defendant, took upon himself and assumed, and said defendant was and is not responsible therefor.

Wherefore this defendant prays judgment herein for costs of this suit.¹

862. ANSWER IN ACTION FOR DAMAGES BY SERVANT SETTING UP ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE.

1. Now comes the defendant above named, and for answer to plaintiff's petition filed herein, first denies each and every allegation therein contained, except that it is a corporation; and it avers that it was not negligent towards plaintiff.

Wherefore it asks to be dismissed herein.

• 2. For a second answer and defense to said petition, defendant avers that if the plaintiff was injured at the time and at the place set forth therein, his injuries were consequent upon one of the risks of the employment in which he was engaged and the work he was doing or assisting in doing at the time, for which defendant is not liable, and therefore asks to be dismissed therein.

3. For a third answer and defense to said petition defendant avers that if plaintiff was injured at the time and at the place set forth therein those injuries were due to his own carelessness and negligence and a lack of attention to his surroundings, and to his own safety, and that therefore defendant was not responsible for such injuries, and it asks to be dismissed herein.²

¹ From form in record *A. T. & S. F. Rly. Co. v. Stone*, 77 Kan. 642.

² From form in record in *Gillaspie v. United Iron Works Company*, 76 Kan. 70.

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863. ANSWER ALLEGING CONTRIBUTORY NEGLIGENCE.

For a second and further defense the defendant says that the injuries sustained by plaintiff were either the result of accident or the carelessness and negligence of said plaintiff, and were not occasioned by the negligent act or omission of said defendant, its agents or servants. And therefore defendant prays judgment for costs.³

864. ANSWER THAT SERVANT ASSUMED RISK INCIDENT TO EMPLOYMENT.

(Action by servant, bridge carpenter, injured while assisting to raise the end of an iron girder.)

Further answering, defendant states that the dangers of plaintiff's alleged employment as a bridge workman and handler of iron beams, being such as were necessarily and usually incident to that work, were voluntarily assumed by him in entering upon and continuing in that employment, and plaintiff's alleged injuries, if any, were within the risk assumed by plaintiff in his said employment and work.

865. ANSWER, SETTING UP CONTRIBUTORY NEGLIGENCE, IN AN ACTION BY AN EMPLOYEE FOR DAMAGES RESULTING FROM AN INJURY RECEIVED WHILE AT WORK ON A FREIGHT ELEVATOR.

Further answering, the defendant states that whatever injuries, if any, were sustained by plaintiff on the occasion mentioned in his petition by and on account of the matters and things in said petition set forth, were caused by the negligence of plaintiff directly contributing thereto in this, to-wit:

That on the said occasion said plaintiff, while ascending in an elevator, carelessly and negligently stood near the edge of the said elevator platform, and as said elevator ascended said plaintiff carelessly and negligently allowed a portion of his foot to project over the edge of said elevator platform in such a manner as to allow it to be struck by a portion of the siding or enclosure of said elevator. And defendant

³ Form in *Atchison, Topeka and Santa Fe R. R. Co. v. Sadler*, 38 Kan. 128.

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states that the said acts of negligence on the part of said plaintiff directly contributed to cause whatever injuries, if any, were sustained by him on said occasion.

866. ANSWER IN ACTION AGAINST MASTER FOR DAMAGES FOR DEATH OF SERVANT, CONTAINING (1) GENERAL DENIAL, (2) ASSUMPTION OF RISK, AND (3) CONTRIBUTORY NEGLIGENCE.

Now comes the defendant and for answer to the plaintiffs' petition denies each and every allegation therein contained, that is not hereinafter admitted.

Defendant admits that it is a corporation under the laws of, and as such engaged in the manufacture of lumber and building material.

Further answering, the defendant admits that E. C. was employed by it and was in its employ on the day of, 19.., as brakeman or switchman and that he was on the said date accidentally run over and killed by a train of cars, operated by the defendant's employees upon railroad track owned and controlled by the St. L. & G. R. Co.

Defendant further answering, says that E. C. was at the time of his injury an employee of the defendant and by accepting such employment he thereby assumed all risks incident to the ordinary discharge of said duties as were imposed upon him and all risks that might arise by reason of the negligence of his coemployees and fellow servants.

The defendant further says that the injury received by the said E. C. was the result of his own negligence and carelessness in slipping down or falling down in front of a moving train.

Wherefore the defendant asks judgment for costs.

867. ANSWER AVERRING (1) ASSUMPTION OF RISK, AND (2) CONTRIBUTORY NEGLIGENCE.

(In action by common laborer due to injuries received by falling from upper story of building in course of construction to basement, wherein the negligence was charged to be failure to protect the floor with boards as expressly required by ordinance.)

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Comes now the defendant and for answer to plaintiff's petition admits that it is a corporation organized as therein alleged and that it was at the time mentioned therein engaged in erecting a building at or near the corner of street and avenue, in the city of, and admits that on the day of, 19.., plaintiff was in its employ as a laborer on the third floor of said building and that he fell therefrom and received certain personal injuries, but defendant denies each and every other allegation in said petition contained.

And for further answer defendant says that the extent to which said third floor and the girders and joists thereof at the time in question, were covered or uncovered, was plainly open and visible and obvious to plaintiff at said time, and that he assumed all the risks of injury to himself in working on or walking about said floor in its said condition.

And for further answer defendant says that the said injuries were sustained by plaintiff as the direct result of his own want of ordinary care in going upon and walking over the uncovered portion of said floor.

Wherefore, etc.

§68. ALLEGATION OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

That at the time the plaintiff received said injuries of which he complains in said petition, and immediately prior thereto, he, said plaintiff, was guilty of contributory negligence whereby the said alleged injuries were caused and occasioned, and at said time the said plaintiff so placed himself upon the train and car, and so moved thereon, and remained in such position, when he knew or by the exercise of ordinary care might have known, that upon the coupling of said cars the same would be jarred and suddenly moved, and while in said position, and so negligent, as aforesaid, and in disregard of all precautions on his part for his own safety, the said plaintiff received the injuries aforesaid by reason of his negligence aforesaid.

And at said time and place, while plaintiff was so engaged

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as brakeman upon said train and cars, he well knew, or by the exercise of ordinary care might have known, of each and all of the dangers and hazards incident to his employment as brakeman, the risk and hazard thereof being by said plaintiff at the time of his said injuries, and prior thereto, assumed.⁴

869. ANSWER CONTAINING GENERAL DENIAL AND SETTING UP AFFIRMATIVE DEFENSES, FIRST, OF CONTRIBUTORY NEGLIGENCE, AND SECOND, A RELEASE OBTAINED FROM PLAINTIFF.

Now comes the above-named defendant, by its attorneys,

⁴ Form in Kansas City, Mexico and Orient Ry. v. Loosley, 76 Kan. 103, 105.

If the assumption of a risk not usually and ordinarily incident to the service is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded. *Maxson v. J. I. Case Threshing Machine Co.*, 81 Neb. 546; *Evans Laundry Co. v. Crawford*, 67 Neb. 153.

It is not necessary to plead that the servant assumed the usual and ordinary risks and hazards incident to the service. *Evans Laundry Co. v. Crawford*, 67 Neb. 153.

A defense that two employees were fellow-servants, must be presented to and passed upon by the district court either by a pleading, instruction, or in some other manner. *Union P. R. Co. v. Elliot*, 54 Neb. 299.

The burden is on the master, if he claims it, to show that the injuries received by a servant were caused by the negligence of a fellow-servant. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1.

Contributory negligence discussed. *Dailey v. Burlington & M. R. Co.*, 58 Neb. 396.

A general allegation of contributory negligence on the part of the plaintiff is good as against a demurrer *ore tenus*. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1.

Where the plaintiff alleges liability of the defendant because of the violation of the duty imposed by the "factory act" (sec. 4680 Gen. Stat. Kan. 1909) contributory negligence of the injured party is an affirmative defense which must be alleged and established by evidence, and in such case the doctrine of assumption of risk is not available as a defense. *Kansas Buff Brick and Mfg. Co. v. Stark*, 77 Kan. 648; *Western Furniture & Mfg. Co. v. Bloom*, 76 Kan. 127.

In an action for the recovery of wages and expenses under a contract of hiring, an answer which merely disputes length of time the plaintiff was in the defendant's service and pleads payment is insufficient to authorize a forfeiture of all compensation on the ground of dishonesty and other flagrant misconduct. *Spaulding v. Pepper*, 73 Kan. 644.

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and, for answer to the petition of the said plaintiff filed in this cause, says that it denies each and every allegation contained in said petition.

Wherefore, having answered herein, said defendant prays for judgment with its costs.

2. For another and further defense to the said petition, this defendant says that, if plaintiff suffered injuries as alleged in said petition, which defendant denies, such injuries were not due to any neglect or want of care on the part of this defendant, but were due altogether to the negligence of the said plaintiff, which said negligence of the plaintiff, defendant says, directly contributed to and brought about said injuries, if the plaintiff in fact suffered any such injuries. And the defendant further says that, if any timber or timbers of its said building fell upon or injured the plaintiff, which it denies, the said plaintiff had full notice of the fact, that such timbers were likely to fall upon and injure him if he remained in proximity thereto, and the defendant says that, notwithstanding such full notice, and notwithstanding ample opportunity to said plaintiff to remove from the neighborhood of any such timbers, the plaintiff nevertheless remained under the same, and thereby voluntarily placed himself in a dangerous situation, knowing at the time that such place was dangerous, and suffered any injuries, if any he did suffer—in consequence of such want of care on his part.

Wherefore, defendant says the plaintiff ought not to be allowed to have or maintain his said action, and defendant, therefore, prays judgment herein with its costs.

3. For another and further defense to the said pretended cause of action of said plaintiff set out in his petition, this defendant says that the said plaintiff ought not to be permitted to have or maintain this action against it, for the reason that heretofore, and after the date when as alleged in said petition the plaintiff suffered injuries in the manner stated in said petition, the said plaintiff entered into an agreement with this defendant in words and figures as follows, to-wit: (agreement of release).

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Which said agreement, this defendant says, was made, accepted and received by both the plaintiff and this defendant in full satisfaction and discharge of all and every claim, existing in favor of the said plaintiff, against this defendant, on account of the injuries complained of in said petition.

And the defendant says, that, in pursuance of the said agreement above set forth, it did provide and furnish and pay for the medical services necessary for the recovery of said plaintiff from the injuries alleged to have been sustained by him, on account of said accident, so far as it was permitted to do so by said plaintiff, and did and provided for him all other things requested by him and necessary to promote his said recovery, so long as he remained in the city of and so long as it was permitted so to do.

But the defendant further says that, about the day of, 19.., said plaintiff departed from the city of, without communicating to this defendant his intention so to remove, and his whereabouts remained unknown to this defendant for some time; that subsequently thereto, when the plaintiff's residence had become known to this defendant, the defendant again procured a competent physician to visit him, and offered the plaintiff the services of said physician at its own cost, as it was bound to do by the terms of its said agreement above set out with the plaintiff, but the said plaintiff refused to accept the services of said physician.

The defendant further says that, since the date of the alleged injuries to the plaintiff, it has kept his name upon its pay roll, as provided in said agreement, at the uniform wages per day for all working days, which he had been up to the time of said injuries earning and credited, and is ready and willing to pay unto the said plaintiff all sums of money, which under the said agreement it undertook and agreed to pay, and avers its willingness now as ever in all matters and things to fully perform and carry out the agreements by it assumed and contained in the writing above set out.

Wherefore, the defendant says that by the said writing and agreement above mentioned the said plaintiff has re-

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linquished all claims against it excepting its obligations under said contract, and has in consideration of the said contract discharged and released this defendant from all and every claim or liability to him for damages on account of any injuries sustained by him as alleged in said petition.

Wherefore, the defendant prays judgment herein with its costs.

CHAPTER XC.

MECHANIC'S LIEN.

870. Answer to action by contractor denying that extra work to the amount claimed was furnished.

870. ANSWER TO ACTION BY CONTRACTOR DENYING THAT EXTRA WORK TO THE AMOUNT CLAIMED WAS FURNISHED.

Now come the said defendants, and for answer to the petition of said plaintiff, say:

1. The defendants admit that on or about the day of, 19.., the said plaintiff entered into a written contract with said defendant I., a copy of which is hereto annexed and made a part hereof, by which said plaintiff was to do and perform all the work, labor, and material necessary to construct a certain building at the corner of N. and T. streets, according to the plans and specifications made a part of the said contract.

2. The said I., as further answer to said petition, says that he has done and performed all that by the terms of said contract he has agreed to do and perform, and has been and is willing to abide by the decision of the architect as to extra work or changes made in plans per terms of contract.

3. The said I. further says in answer to said petition, that the amount found due the said plaintiff for extra work upon said building caused by change of plans, as per architect's certificate, is dollars, and that the said defendant has paid upon said amount the sum of dollars, leaving a balance unpaid of dollars, which sum he has duly tendered the said plaintiff, and which said plaintiff has refused to accept as he had agreed to do in his said contract.

4. The said defendants deny each and every allegation in said petition, except where expressly admitted in this answer.

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Wherefore the defendants pray that they may go hence and recover judgment against said plaintiff for the costs of suit.¹

¹ Form in *Anderson v. Imhoff*, 34 Neb. 335.

Form of answer denying that the lien was filed within four months of the furnishing of the material. *Gray v. Elbling*, 35 Neb. 278.

Form of answer in action by materialman setting up various defenses. *Ballou v. Black*, 21 Neb. 131.

A cross petition on a mechanic's lien may be filed by the defendant in an action by the plaintiff on a mechanic's lien. Amendments and pleadings discussed. *Great Spirit Springs Co. v. Chicago Lumber Co.*, 47 Kan. 672.

A general denial of the lien by the owner of the building is sufficient to put the materialman on proof of the amount actually due for the material furnished. *Lee v. Storz Brewing Co.*, 75 Neb. 212.

The owner may offset any actual damages which he has sustained by reason of the contractor's failure to complete the building in time, provided the damages are such as may be said to have been in the contemplation of the parties when the contract was made. *Foster v. Rock Island Lumber & Mfg. Co.*, 76 Kan. 428.

CHAPTER XCI.

MORTGAGES.

871. Answer and cross petition praying for foreclosure of mortgage held by defendant and that it be declared a second lien on said premises.
872. Answer to an action to foreclose a mortgage setting up fraud in the execution of note and mortgage and setting up claim of homestead.
873. Answer denying execution of note or mortgage.
871. ANSWER AND CROSS PETITION PRAYING FOR FORECLOSURE OF MORTGAGE HELD BY DEFENDANT AND THAT IT BE DECLARED A SECOND LIEN ON SAID PREMISES.

And now comes the defendant G. E. W. and for her separate answer to the plaintiff's petition and for her cross-petition herein says:

1. That she admits that the allegations of plaintiff's petition are true except as to the allegations of the amount due the plaintiff upon its said note and mortgage and as to such allegations this defendant has not sufficient information to form a belief and she, therefore, denies that there is any amount whatever due to the plaintiff upon its said note and mortgage and demands strict proof in respect to such amount if any there is.

2. That on the day of, 19.., the defendant A. D. M., for a valuable consideration executed and delivered to this answering defendant his seven promissory notes in writing each for the sum of dollars and due respectfully in one, two, three, four, five, six, and seven years from said date with interest at the rate of per cent. per annum from said date until paid; that true copies of said promissory notes are hereto attached and marked respectively A, B, C, D, E, F, and G and made a part of this answer and cross-petition.

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3. That at the time of the execution and delivery of the said notes and for the purpose of securing the payment of the same, the said A. D. M., and the defendant G. C. M. (who then was and still is the wife of the said A. D. M.), who were then the owners of the real estate hereinafter described, executed and delivered to this defendant a mortgage deed and thereby conveyed to this defendant the following described real estate situated in the city of W., G. county, Nebraska, to-wit: (describe), said premises being the same premises described in plaintiff's petition herein, which said mortgage deed, among other conditions, contained the condition, that if the said A. D. M., his heirs, executors or administrators should pay or cause to be paid to the said G. E. W. the sum of dollars, according to the tenor and effect of the said promissory notes, with interest thereon according to the terms of said notes, then the said mortgage deed should be void otherwise, however, it should remain and be in full force and effect.

4. That the said mortgage deed was by the said G. C. M. and A. D. M. duly executed, acknowledged, and delivered to this defendant, and thereafter and on the day of, 19.., was duly filed for record in the office of the register of deeds of G. county, Nebraska, and therein duly recorded in book of mortgages on page and is the second lien upon the said premises, subject only to the said mortgage of the plaintiff, but prior and superior to any right, title or interest which the co-defendants of this defendant, or any of them, have in, to or upon the said premises or any part thereof.

5. That the said A. D. M. and G. C. M. have not paid the amount secured by this defendant's said mortgage as required by the conditions thereof, whereby said mortgage deed has become absolute; that the said note which by its terms became due on the day of, 19.., and was not then paid and is still due and unpaid, and it was provided in this defendant's said mortgage that in case of the non-payment by the said A. D. M. and G. C. M. or their heirs, executors or administrators of the interest or principal

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of said notes, or any part thereof, at the time the same became due, then the whole principal sum and interest secured by said mortgage should become due and payable, whereby the whole amount secured by said mortgage, to-wit:—the sum of \$. with interest thereon at the rate of per cent. per annum from the day of, 19.., became and is due and payable and this defendant has elected to declare, and hereby does declare, the whole amount secured by said mortgage, to-wit: the said sum of \$., with interest thereon as aforesaid to be due and payable.

6. That no proceedings at law have been had for the recovery of the amount secured by said mortgage or any part thereof, nor has said debt or any part thereof been collected or paid and there is now due upon said notes and mortgage to this defendant from the said A. D. M. the full sum of \$. with interest thereon at the rate of per cent. per annum from the day of, 19..

Wherefore, this defendant prays that her said mortgage may be decreed to be the second lien upon the said premises, subject only to the lien of the plaintiff's said mortgage, but prior and superior to any title, lien or interest of the co-defendants of this defendant in, to and upon said premises; that an accounting may be taken of the amount due to this defendant from the said A. D. M. upon this defendant's said notes and mortgage and also that an accounting may be had of the amount due the plaintiff upon its said notes and mortgage; that said premises may be sold according to law and out of the proceeds thereof this defendant may be paid the amount found to be due her on her said notes and mortgage, with interest and costs of suit; that the said A. D. M. and G. C. M. may be forever barred and foreclosed of and from all right, title, interest and equity of redemption in and to the said premises and every part thereof; that the defendant A. D. M. be adjudged to pay any deficiency that may remain after applying the proceeds of the sale to the payment of the said indebtedness due to

this defendant; and that this defendant may have such other and further relief as may be just and equitable.¹

872. ANSWER TO AN ACTION TO FORECLOSE A MORTGAGE SETTING UP FRAUD IN THE EXECUTION OF NOTE AND MORTGAGE AND SETTING UP CLAIM OF HOMESTEAD.

Comes now the defendant A. M. B., and for answer to the petition filed against her in said cause says that she has never seen the note set forth and described in the plaintiff's petition to her knowledge; that the original note if such note exists, is in possession of the plaintiff, and this defendant has no access thereto, and therefore cannot say whether her genuine signature appears on said note or not, but she alleges the facts to be that if her signature and name signed to a note for dollars, as set forth in the plaintiff's petition, that her signature to the same was obtained fraudulently and without her knowledge and consent.

The defendant further answering, says that on or about the day of, 19.., she was, and still is a married woman and the head of a family and was occupying and residing upon the premises described in plaintiff's petition and ever since has resided upon and occupied the same as her homestead, under the laws of the State of Nebraska, and the said premises on the day of, were and ever since have been, and still are the homestead of this answering defendant; and that said premises at that time were, and still are, and ever have been of less value than dollars, and of about the value of dollars and no more, and consists of one lot within the corporate limits of the village of N. Y., in Y. county, Nebraska, and now a part of the city of Y. in said county, with a small dwelling house thereon, in which this answering defendant then resided and still resides, as hereinbefore alleged, and said mortgage was not signed, executed, or acknowledged by the husband of this defendant.²

¹ From form in record in Nebraska Central Bld'g & Loan Ass'n v. McCandless, 83 Neb. 536.

² Form in France v. Bell, 52 Neb. 57.

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873. ANSWER DENYING EXECUTION OF NOTE OR MORTGAGE.

Now comes the defendant, J. W. W., and for a further and more specific answer says that he never executed the note described in plaintiff's petition, nor the mortgage purporting to secure the same, upon the land therein described and which he is informed and believes has been spread upon the records in the office of the recorder of deeds in the county of F., in the State of N., and never authorized any person to sign said note or said mortgage for him, and never acknowledged before any officer authorized by law to take acknowledgments of deeds or mortgages the execution thereof, and never delivered such a note or mortgage, or either of them, to I. B. C., or any other person or corporation whatsoever.³

³ Form in *Capital National Bank v. Williams*, 35 Neb. 410.

The defense of **usury** is to be treated as any other defense, and has no especial claims on the favor or indulgence of the court. *Quære*, is the defense of **usury** so far a personal one that the wife of the debtor cannot plead it where the homestead is mortgaged to secure the usurious debt, and such also that a subsequent mortgagee cannot plead it. *Clark v. Spencer*, 14 Kan. 306.

It is no defense to a foreclosure action on a purchase-money mortgage that the mortgagor has commenced a civil action against a third person, claiming that such third person, for the purpose of clouding his title to the land mortgaged, has asserted an outstanding title thereto. *Emmons v. Gille*, 51 Kan. 178.

Counterclaim. A cause of action for alleged abuse of process and malicious prosecution of a civil suit, based on an attempt to foreclose a certain mortgage in the federal courts, cannot be set up by way of counterclaim in a subsequent suit to foreclose said mortgage. *President and Directors of Ins. Co. of North America v. Parker*, 64 Neb. 411.

Failure of title. In an action brought by the vendor of real estate, conveyed by deed of general warranty to foreclose a mortgage given for the purchase money, the vendee and mortgagor may set up as a defense a failure of the title to the property. *Chambers v. Cox*, 23 Kan. 277.

That the loaning of money by a foreign insurance company on real estate security in Kansas is *ultra vires*, and forbidden, the defendant should plead its charter, or the laws of the state where it was organized, or both such charter and laws, and on the trial produce the same in evidence. *Life Association of America v. Cook*, 20 Kan. 19.

A general averment in the answer denied in the reply that the mortgage was prior to all other liens, does not prevail against the specific pleading of fact, and does not put the date of delivery of the mortgage in issue. *First Nat. Bank of Wymore v. Myers*, 44 Neb. 306.

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A junior mortgagee in a foreclosure case who does not pray for a foreclosure is entitled only to a decree fixing his priority and directing distribution in case of sale, accordingly. *Seeley v. Wickstrom*, 49 Neb. 730.

A defendant in a foreclosure proceeding sued by the initial letters of his name, who does not appear in the action, and upon whom personal service of a summons is not made, is not bound by the decree rendered therein. *Herbage v. McKee*, 82 Neb. 354.

Where in an answer the execution and delivery of a note and mortgage pleaded in the petition are admitted, the legal presumption is that the ownership continued and remained in the party to whom delivered, and a mere denial of ownership in the answer is unavailing. The burden is on the defendant, after admitting the execution and delivery, to plead and prove some fact showing such want of ownership. *Bank of Stockham v. Alter*, 61 Neb. 359.

CHAPTER XCII.

NEGLIGENCE.

- 874. Answer setting up contributory negligence in failing to look and listen before going upon the track of defendant.
- 875. Answer alleging contributory negligence.
- 876. Allegation of contributory negligence.
- 877. Answer to action for alleged injuries at railway crossing containing general denial, plea of contributory negligence, and plea that place where plaintiff was injured was not a public highway.
- 878. Answer alleging that injury was unavoidable and setting up contributory negligence.

874. ANSWER SETTING UP CONTRIBUTORY NEGLIGENCE IN FAILING TO LOOK AND LISTEN BEFORE GOING UPON THE TRACK OF DEFENDANT.

And for a further answer and defense, defendant says that plaintiff's alleged injuries were caused by his own negligence in going upon or so near a railroad track, on which a car was approaching as to come in collision with said car at a time and place when and where plaintiff, by looking and listening, could have seen and heard the approaching car in time to have avoided collision with the same; but plaintiff, disregarding his duties in that respect, failed and omitted to look and listen for said approaching car, and by such neglect directly contributed to cause his said injuries.¹

¹ Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury. *Cook v. Chicago, R. I. & P. Ry. Co.*, 78 Neb. 64; *Atchison, T. & S. F. Ry. Co. v. Peck*, 79 Kan. 413; *Western Union Telegraph Co. v. Morris*, 10 Kan. App. 61.

An answer in a personal injury case, which sets forth an act or omission of the plaintiff, characterizes it as negligent, and alleges that it caused or contributed to the injury complained of by the plaintiff's petition, is sufficient to tender the affirmative issue of contributory negligence. *Lincoln Traction Co. v. Brookover*, 77 Neb. 221.

875. ANSWER ALLEGING CONTRIBUTORY NEGLIGENCE.

And for a second and further ground of defense herein defendant further avers that if plaintiff was in any wise damaged or injured as set forth in the petition, which this defendant denies, then the defendant avers that the plaintiff and her agents, by her duly appointed and authorized, so acted and conducted themselves as to contribute to the damage and injury complained of.²

876. ALLEGATION OF CONTRIBUTORY NEGLIGENCE.

Defendant states that if the said plaintiff suffered any injuries at the time and place mentioned in said petition, the same were caused by the careless, negligent and reckless acts of said plaintiff, and the same would not have occurred but for the careless, negligent and reckless acts of said plaintiff.³

877. ANSWER TO ACTION FOR ALLEGED INJURIES AT RAILWAY CROSSING CONTAINING GENERAL DENIAL, PLEA OF CONTRIBUTORY NEGLIGENCE, AND PLEA THAT PLACE WHERE PLAINTIFF WAS INJURED WAS NOT A PUBLIC HIGHWAY.

And now comes the said M. K. & T. railway company, defendant, by W. A. J., its attorney, and for its answer to the petition of said M. L., plaintiff, and says that the said plaintiff ought not to have or maintain her said action herein against this defendant, because it denies each and every allegation therein set forth.

And for a further and second answer to the petition of the said plaintiff the defendant says she ought not to have or maintain her said action therein, because the place where

Insufficient denial of the negligence alleged by plaintiff. *Harden v. Atchison and Nebraska R. R. Co.*, 4 Neb. 521.

In order to entitle a carrier to make the defense that it has adopted and promulgated, rules and regulations which the passenger has violated, it must plead its rules and allege the facts which constitute the defense. *Lane v. Choctaw, Oklahoma and Gulf Ry. Co.*, 19 Okla. 324.

Answer setting up contributory negligence. *Railway Co. v. Faber*, 7 Kan. App. 481.

² Form in *Leavenworth Light and Heating Co. v. Waller*, 65 Kan. 514.

³ Form in *Topeka Ry. Co. v. Casson*, 74 Kan. 834.

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the alleged injuries are said to have occurred is not a public crossing of said railway; that no public highway crosses said railway at the place where plaintiff alleges that her wagon was upset; that it was at a point on said railway that was never laid out as a public highway, and at a point where said railway company was not required to put in a safe and convenient crossing, nor any crossing whatever; that said railway has been built for more than years, and has never been required to put in any crossing whatever at said place where the pretended injuries are said to have been inflicted.

And for a third and further answer to the petition of the said plaintiff, the defendant says, she ought not to have nor maintain her said action herein, because the said M. L., plaintiff, was herself guilty of carelessness and negligence directly contributing to her injuries. And having fully answered, the defendant asks to be hence discharged with its costs.⁴

878. ANSWER ALLEGING THAT INJURY WAS UNAVOIDABLE AND SETTING UP CONTRIBUTORY NEGLIGENCE.

Defendant admits and alleges that on the day of, 19.., while plaintiff was walking on the track on defendant's ground in the county and state therein stated, she was run against and struck by defendant's locomotive attached to one of its passenger trains and thrown from the track, but alleges that the same was unavoidable by defendant, its agents or employees, and without fault of defendant, its agents or employees.

Defendant avers that the said plaintiff, at the time aforesaid, was, wholly without authority or license, walking without any precaution between the rails of the defendant's track, and was a trespasser thereon.

The defendant alleges that whatever injuries, if any, which the plaintiff so then and there sustained at the time of said collision, the said injuries were by said plaintiff received and sustained by and through her own fault, carelessness,

⁴ Form in *M. K. & T. R. Co. v. Long*, 27 Kan. 684.

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and negligence contributing thereto, and in no respect by or through any fault, wrong, or negligence of the said defendant, its employees, agents, servants, operators, or engineers.

The defendant denies each and every other allegation of the said petition not herein answered or denied.⁵

⁵ Form in Omaha and Republican Valley R. R. Co. v. Cook, 37 Neb. 435.

CHAPTER XCIII.

NUISANCE.

879. Answer to an action for damages for filling up a basement, setting up that the basement had been declared a nuisance.

879. ANSWER TO AN ACTION FOR DAMAGES FOR FILLING UP A BASEMENT, SETTING UP THAT THE BASEMENT HAD BEEN DECLARED A NUISANCE.

Defendants for further answer state that their codefendant, the city of S. G., by virtue of the laws governing such cities of the fourth class has a right to make and pass and is authorized to make and pass ordinances to regulate and to secure to its inhabitants the general health of the city and to prevent, abate and remove nuisances and in accordance with the aforesaid authority, the said city of S. G. did prepare and legally pass an ordinance to secure to its inhabitants health and to prevent disease and sickness, to abate and remove all nuisances within the limits of the aforesaid city which were liable to engender disease and injure the health of the inhabitants of said city.

Defendants for further answer state that there was located within the limits of the aforesaid city and joining up to one of the thoroughfares or streets of said city, and within a thickly populated portion of said city, a building with a basement; which building was and had been used as a livery stable in which was and had been kept horses which had been fed and kept therein, and being the same building plaintiff refers to in his petition, and that the occupants of said building negligently suffered horse manure to accumulate in the basement thereof to the depth of feet or more, and did carelessly and negligently permit filth to accumulate in said basement, and suffered rats to congregate in said filth and manure so accumulated, as aforesaid, and carelessly, and negligently suffered and permitted said basement to be-

come filled up with water to the depth of feet or more, which drowned the rats so congregated therein, and wet said manure and filth and permitted the same to stand in that condition until it stunk, and from which an obnoxious odor would arise, which was injurious to the health of the inhabitants of said city and caused disease to the inhabitants thereof, and was and became a nuisance, and in accordance with the aforesaid ordinances of said city, the said city ordered said basement filled in with earth to prevent the arising of said obnoxious odors, and to remove and abate the aforesaid nuisance as provided by said ordinances, of all of which facts plaintiff had had due notice.

Defendants for further answer state that there was located within the limits of the aforesaid city and joining up to one of the thoroughfares or streets of said city and within a thickly populated portion of said city, a building with a basement, which building was and had been used as a livery stable and being the same building referred to by plaintiff in his petition and involved in this suit, and that the basement of said building was so constructed as to become and was a nuisance *per se*, and that on account of such location and defective construction of said basement and building, filth would necessarily accumulate therein, and on account of such filth so accumulating, obnoxious odors and impure vapors would arise therefrom and destroy the comfort of occupants of adjacent property, and endanger the health of such occupants and diminish the value of such adjacent property, and that by reason of the location and the construction of said basement as aforesaid, said nuisance as aforesaid could not have been removed without resorting to filling same up in the manner and form as aforesaid and in filling same up, defendants claim that the city used due care and with a view to preserve said property and to secure to its inhabitants the general health of said city and to preserve and protect the health of occupants of adjacent property and preserve the value thereof.

CHAPTER XCIV.

PARTITION.

880. Answer, in an action for partition setting up adverse possession.

881. Answer to action in partition setting up affirmative defenses.

**880. ANSWER, IN AN ACTION FOR PARTITION SETTING UP
ADVERSE POSSESSION.**

Defendant alleges that he is the owner and in possession of the undivided one-half of all the premises described in plaintiffs' petition.

Defendant alleges that he and his grantors, and the defendant, R. C., and her grantors, have been in the open, notorious and continued adverse and exclusive possession, claiming ownership of all of the premises described in plaintiffs' petition for more than years next before the filing of plaintiffs' petition herein.

Defendant denies that the plaintiffs or any of them have any, or ever had any, right, title, interest, or estate, in, of or to any of the premises described in plaintiffs' petition.

Defendant alleges that whatever right, title, interest or estate in, of or to any of said premises which plaintiffs have or claim, cannot be adjudicated in this suit.

**881. ANSWER TO ACTION IN PARTITION SETTING UP AF-
FIRMATIVE DEFENSES.**

Now comes J. M. H., and for his separate answer to the petition of plaintiffs, denies each and every allegation contained therein save what is hereinafter expressly admitted, wherefore he asks judgment.

And for a second and further defense to this action, this defendant states that he is in the actual and exclusive possession of the whole of said real estate, and was at and has been ever since the institution of this action; that so far as the said plaintiff, S. A. G. H., is concerned, she has no pos-

session of right, title, interest or estate in said land; that at the time of the alleged conveyance to S. A. G. H., her co-plaintiff herein was indebted to various persons, in the aggregate in excess of dollars, being as much as, or in excess of the value of said G. W. H. property, real and personal, and for that reason and consideration and no other than the return to this defendant of his note by said G. W. H., and for no consideration whatever from the said S. A. G. H., said conveyance was made in her name and delivered to the said G. W. H., but not to her, to hinder, delay, defraud and deceive his creditors, by thus covering up his property; that, one J. H. A. one of such creditors, obtained judgment against said G. W. H. and defendant for the sum of dollars, at K. C., in the circuit court of J. county, State of, at the term of said court, in 19...; that afterwards, at the instance of said A., an execution was duly issued on said judgment to the sheriff of C. county, ..., and at the last term of the circuit court of said county of C., State of, all the right, title, interest and estate of the said G. W. H. in the real estate in controversy was duly sold and conveyed by said sheriff to one J. M. H., who is not a party to this action; and the said J. M. H. and this defendant are the sole owners of said real estate, and neither of plaintiffs have now any right or estate therein.¹

¹ Answer to state amount and nature of respective interests. Comp. Laws Okla. 1909, sec. 6138; Cob. Ann. Stat. Neb. 1911, sec. 1754; Gen. Stat. Kan. 1909, sec. 6230.

In an action of partition brought by the grantee of one joint owner of the property against the other joint owners, wherein only a portion of the joint property is included, the defendants may, by answer in the nature of a cross-demand for affirmative relief, have the entire joint estate, and all parties in interest therein, brought before the court, partition made, and the rights of all parties in interest determined and protected by the decree. *Hazen v. Webb*, 65 Kan. 38.

In an action for partition of one tract of land, where the defendant claims title to the whole under an agreement with plaintiff's father with reference to the tract of which partition is asked by plaintiff, and also to two other tracts, it is not error for the court to consider and determine the rights of the parties with reference to all of the lands included in the agreement. *English v. English*, 53 Kan. 173.

An answer of a certain defendant pleaded an ouster, alleging that

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she had exclusive possession of the real estate under a claim of title through a tax deed. The court was justified in finding that such defendant had actually ousted her cotenants, and hence was chargeable with the actual rental value of property. *Saville v. Saville*, 63 Kan. 861.

CHAPTER XCV.

PARTNERSHIP.

882. Answer to an action for contribution, denying existence of partnership.
883. Answer to action to dissolve and for settlement of partnership.
884. Affidavit of defendant denying under oath that he is a member of a partnership firm.

882. ANSWER TO AN ACTION FOR CONTRIBUTION, DENYING EXISTENCE OF PARTNERSHIP.

Comes now the defendant above named, A. P., and for his answer to the amended petition of plaintiffs filed herein denies each, every and all material allegations therein contained, set out, and alleged.

And for a further defense thereto defendant alleges and shows:

1. That the said defendant and the said J. M. W., deceased, were not partners as alleged in said plaintiffs' amended petition and had not been for a long time prior to the said time alleged; that the said partnership of W. & P. had been dissolved by mutual agreement and consent of the parties thereto for more than years previous to the said date on which the plaintiffs allege said partnership existed; and that the said W. & P. were not doing business under the firm name and style of W. & P. at said time nor for a long time before in the said county of D., K., or anywhere else; that they did not become liable as partners on said promissory note to said L. P. in any way, sense or manner, nor was said note signed by said W. & P. as partners.

2. That said property sold by the said sheriff of D. county, K., was not the property of the said partnership of W. and P.¹

¹ Form in *Palm v. Poponoe*, 60 Kan. 297, 301.

PARTNERSHIP.

883. ANSWER TO ACTION TO DISSOLVE AND FOR SETTLEMENT OF PARTNERSHIP.

The defendant, ... , consents to the dissolution of the partnership in the complaint mentioned, and unites in the prayer of the plaintiff for the settlement of the business and accounts of the firm, and for the division of the assets that may remain after the payment of the firm debts, and for whatever else is proper.²

884. AFFIDAVIT OF DEFENDANT DENYING UNDER OATH THAT HE IS A MEMBER OF A PARTNERSHIP FIRM.

State of ,
County of , } ss.

J. L. being duly sworn on his oath states, that he was not at any time of the times stated in the petition in the above entitled cause, a member of any firm doing business under the name of M. C. C. & I. Co., and that he is not a partner with any of the codefendants named in the petition in any manner at any time stated in the petition.³

² One who, by his answer to a petition for an accounting, joins issue on the facts, pleads a counterclaim, and himself prays an accounting of all the transactions cannot be afterwards heard to allege that the petition did not contain averments sufficient to entitle the plaintiff to demand an accounting. *Morris v. Haas*, 54 Neb. 579.

³ The existence of a partnership if alleged in the petition must be denied under oath, otherwise it will be taken as true. Gen. Stat. of Kan. 1909, sec. 5703; Comp. Laws of Okla. 1909, sec. 5648.

A claim against a member of a partnership cannot be set off against a debt due the firm. *Folsom v. Pailing*, 58 Neb. 478.

The defense of statute of limitations held to be well pleaded in *Wigton v. Smith*, 57 Neb. 299.

CHAPTER XCVI.

PHYSICIAN AND PATIENT.

885. Answer to action for damages for malpractice alleging contributory negligence.

886. Answer in an action for damages alleged to have been caused by malpractice of physician.

885. ANSWER TO ACTION FOR DAMAGES FOR MALPRACTICE ALLEGING CONTRIBUTORY NEGLIGENCE.

That he gave to the said plaintiff's injury proper, careful and skillful treatment and such treatment as the condition of the injury and the plaintiff would permit him to give. That the operation complained of and the bad results therefrom, were caused by plaintiff's own actions and commands; and not by want of any skill or suitable care on the part of the defendant.¹

886. ANSWER IN AN ACTION FOR DAMAGES ALLEGED TO HAVE BEEN CAUSED BY MALPRACTICE OF PHYSICIAN.

Defendant for answer to plaintiff's petition filed herein, admits that on the day of, 19.., he was a physician and surgeon, and engaged in the practice of his profession as such, in M. county, ..., and had been so engaged for many years; that on or about that time the plaintiff's shoulder was dislocated, he was called upon in a professional capacity to treat the plaintiff therefor and reduce such dislocation; that he properly treated the plaintiff, and reduced the said dislocation according to the usual and most approved method of medicine and surgery, and in every particular properly treated the plaintiff's wound and ailment, and having so done dismissed his said patient, and was paid for his professional services in so doing, and his employment then ceased, and if the plaintiff's arm and shoulder grew

¹ Form in *Leisenring v. La Croix*, 68 Neb. 803.

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stiff, and she entirely lost the use of same, or became deformed, it was through no fault, negligence or unskillfulness on the part of the defendant.

Defendant says that after properly treating the plaintiff's injury, and reducing the dislocation, and giving the same the proper treatment and attention, and the proper directions for caring for the same, he was not again called for by plaintiff to treat the said wound, and if any other or greater inconvenience or injury resulted to the plaintiff than is inevitable and the usual and natural result thereof, it was occasioned by plaintiff's own negligence and want of care and caution, and the said defendant says that he is informed and believes, and so charges the fact to be, that the plaintiff, after being properly treated and advised in every particular by him, did again dislocate her arm or shoulder by attempting to perform hard labor, and performing her usual and ordinary household duties, before she had recovered from the wound aforesaid, and by attempting to do work and labor she was unable to do, and the certain result of which would be to dislocate the joint again; that after the joint was again dislocated, he was not notified thereof, nor called upon to treat the case again, and had no opportunity so to do, and that all the injuries the plaintiff has suffered on account of said wound other than those necessarily occurring and arising from such injuries, were occasioned by her own negligence and want of care in taking care of the same after treatment, and that the same contributed thereto.

The defendant denies every other allegation of the plaintiff not herein specifically admitted, and having fully answered the complaint of plaintiff, asks to be discharged with costs.

CHAPTER XCVII.

PRINCIPAL AND SURETY.

887. Answer by wife who was surety on her husband's note alleging release by reason of extending time of payment without her consent.
888. Separate answer of surety.

887. ANSWER BY WIFE WHO WAS SURETY ON HER HUSBAND'S NOTE ALLEGING RELEASE BY REASON OF EXTENDING TIME OF PAYMENT WITHOUT HER CONSENT.

1. Now comes the defendant and denies each and every material allegation, averment and statement therein contained which are not herein expressly admitted.

2. Further answering said petition this defendant admits the execution by her of the principal note and the coupons interest notes thereto attached and of the mortgage as alleged in plaintiff's petition; admits that at the time of the execution of said principal note said coupons interest notes were attached thereto as a part thereof, have never been detached therefrom and this defendant denies that said coupon interest notes or either of them constitute a separate cause of action against either or any of the defendants therein.

3. For further answer to said petition and as a defense to all claims and pretended causes of action in favor of said plaintiff and against this defendant, she states and alleges that the land described in plaintiff's petition is and ever since the day of, 19.., has been the sole and separate property of this defendant; that she is and during all of said time has been a married woman; that she is and during all of said time has been the wife of her co-defendant and that ever since said date she has occupied said land continuously with her said husband and her children as her homestead and has not had at any time since said date and has not now any other homestead.

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This defendant further states that she signed said principal note and the coupons or interest notes thereto attached as surety only for her co-defendant and at his request, and that she also executed said mortgage at the request of her said co-defendant as surety only for said E. P. D. and in no other way. That no consideration whatever was ever paid to her by plaintiff, her said co-defendant, or by any other person for signing and executing said note and mortgage and that she never received any of the proceeds thereof and that she signed said note and mortgage as surety only of the said E. P. D. and in no other way, all of which was well known to said plaintiff at the time of the execution of said notes and mortgage. And this defendant alleges and states that prior to the maturity of said principal note for a valuable consideration paid by her co-defendant, and without the knowledge or consent of this defendant, the said plaintiff extended the time for the payment of said indebtedness evidenced by said notes and mortgage, for the term of eighteen months from and after the maturity thereof, to-wit: for one year and a half, being from , 19.., to , 19... Said extension was in writing, was on the back of said note and was in the words and figures following, to-wit:

“The within bond is hereby extended upon same terms as when executed for years, namely, to , 19... L. J. S. D.

“E. P. D.”

This defendant states that by reason of the facts alleged as aforesaid and of the fact that she was surety only for her co-defendant in the execution of said notes and mortgage, that the land described in said mortgage is and has always been her sole and separate property and never was the property of said E. P. D. except his interest therein as the husband of this defendant, this defendant and said property is released from all liability to said plaintiff thereon.

Wherefore, this defendant prays that she have and recover her costs herein; that the court find and adjudge that any judgment that may be rendered in this action against

her co-defendant E. P. D. upon the notes set out in plaintiff's petition is not a lien against the real estate described in plaintiff's petition and that this defendant have all such other and further orders, judgments and decrees in the premises, as may be agreeable to equity.¹

888. SEPARATE ANSWER OF SURETY.

1. Now comes the said defendant and for his separate answer to the petition of the plaintiff denies each and every material allegation, averment and statement herein contained which is not herein specifically admitted.

2. Further answering said plaintiff's petition this defendant admits the execution of the principal note and the coupon or interest notes attached thereto as alleged in said petition; admits that at the time of the execution of said principal and interest notes and at the time of the commencement of this suit all said interest notes or coupons were attached to and were a part of said principal note; admits the execution of the mortgage set out in said petition and that the execution of said principal and interest notes or coupons and said mortgage was a single transaction and that all of said principal and interest notes or coupons and said mortgage were done at the same time and were part and parcel of the same transaction and that said interest notes or coupons have never been separated from said principal note and have never been sold, transferred or delivered by the original payee to any other person.

3. This defendant further answering said petition states that prior to the maturity of said interest note for a valuable consideration then paid by this defendant, said plaintiff duly extended the time of payment of the indebtedness by this defendant for the term of eighteen months from and after the maturity thereof, to-wit: to , 19... Said extension of the time of payment was in writing, was on the back of said note and was in the words and figures following, to-wit:

"The within bond is hereby extended upon the same terms

¹ From form in record in Diehl v. Diehl, 75 Kan. 38.

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as when executed for years, namely, to ,
19... L. J. S. D.

“E. P. D.”

Wherefore this defendant demands judgment for his costs
and equitable relief.²

² From form in record, Diehl v. Diehl, 75 Kan. 38.

CHAPTER XCVIII.

QUIETING TITLE.

889. Answer consisting of general denial and claim of title under execution sale.

889. ANSWER CONSISTING OF GENERAL DENIAL AND CLAIM OF TITLE UNDER AN EXECUTION SALE.

Now comes the said defendant, W. M., and for answer to the petition of said plaintiff, N. C. M., filed in this cause, says: That he denies each and every allegation in said petition contained.

And said defendant alleges that at the time of the commencement of this action the said defendant was owner in fee simple of the real estate and premises described in said petition, and at the time of the filing of the said petition said defendant, W. M., was in the full, complete and uninterrupted possession of the said premises described in plaintiff's petition.

Defendant further alleges that said plaintiff has no title or right to possession in and to the said real estate; that the title to said real estate was in said L. F. W., in law and in equity, at the time said real estate was sold on execution by the sheriff of C. county to said defendant, and the title and right of possession in and to said real estate thereby passed to said defendant.

Wherefore said defendant prays judgment that said plaintiff take nothing by his said action; that said defendant be adjudged the absolute owner of said real estate, and for judgment against said plaintiff for all costs.¹

¹ From form in *Momsen v. William Mosier*, 13 Okla. 41.

The answer, statutory provision. Comp. Laws Okla. 1909, sec. 6123; Gen. Laws of Kan. 1909, sec. 6213.

Where a defendant in an action to quiet title to real estate desires to be discharged without costs, he must file an absolute and unqualified

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disclaimer to any title or interest in the land which is the subject matter of the action. *Moore v. Wallace*, 16 Okla. 114.

Where the answer contains, besides the plea of a specific title a denial of the allegations of the petition, it is not error to admit in evidence a voluntary conveyance from the plaintiff, a sheriff's or a tax deed, or any other legal testimony tending to show that plaintiff is not the owner as alleged, whether specifically set up in the answer or not. *Morrill v. Douglass*, 14 Kan. 228.

In an action to quiet title where it is shown that the plaintiff is in the actual possession of the property in controversy, the defendant cannot defeat the plaintiff's action except by showing a paramount right in himself. He cannot defeat such action by showing a paramount right in some other person, even if this other person should be a co-defendant. *Brenner v. Bigelow*, 8 Kan. 332.

CHAPTER XCIX.

REPLEVIN.

890. Answer of defendant in replevin setting up that he holds possession of the property by virtue of an attachment order.
891. Answer by sheriff setting up right to goods under execution.

890. ANSWER OF DEFENDANT IN REPLEVIN SETTING UP THAT HE HOLDS POSSESSION OF THE PROPERTY BY VIRTUE OF AN ATTACHMENT ORDER.

Now comes the defendant and for answer to the plaintiffs' petition herein alleges that on the day of, 19.., orders of attachment were issued out of the county court of B. county, Nebraska, in the case of W. J. C. and C. B. against J. W. and C. A. B., and in the case of the U. S. W. E. & P. Co. against J. W. The claim of the said W. J. C. and C. B. as aforesaid aggregated dollars, and the claim of the said W. E. & P. Co. aggregated dollars.

2. That on said day of, 19.., as aforesaid, this defendant was the duly elected and qualified constable in and for K. B. county, Nebraska, and that as such constable and in pursuance of the command contained in said orders of attachment the said defendant did, on said date as aforesaid, levy upon and attach the goods and chattels described in plaintiffs' petition as the property of said J. W. and held the same to satisfy said claims as aforesaid, and so held said property at the commencement of this action.

3. The defendant for further answer to plaintiffs' petition says that said J. W. and G. P. A. executed to said plaintiffs the chattel mortgage described in said petition; that the said mortgage covered and described a stock of goods and merchandise in the city of K., Nebraska; that said mortgagors were allowed, with full knowledge and consent of said mortgagee, to remain in possession of said stock of goods and to sell and dispose of said mortgaged property

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and use the proceeds of said sales for their own use and benefit, and that said proceeds of said sales were not applied upon said debt secured by said mortgage, and that said mortgage was therefore fraudulent and void as to this defendant.

4. The defendant denies each and every allegation in said petition contained not hereinbefore specifically admitted or denied.¹

891. ANSWER BY SHERIFF SETTING UP RIGHT TO GOODS UNDER EXECUTION.

Defendant states that as such sheriff, on or about the day of, 19.., he took the said goods and chattels mentioned in plaintiff's petition as the goods of A. W. and B. S., comprising the firm of W. and S., by virtue of an execution issued by H. D. K., county judge of M. county, Nebraska, on the day of, 19.., which said execution was issued upon a judgment rendered in the county court of M. county, Nebraska, on the day of, 19.., in favor of F. S. and against A. W. and B. S., comprising the firm of W. and S., and the said execution was directed to him, the defendant, as such sheriff, and commanded him to make the amount of the same and costs out of the goods and chattels of said A. W. and B. S., being the members of the firm of W. & S., as aforesaid. That the defendant took said goods and chattels, as aforesaid, upon said execution, and sold the same as required by law, and returned the proceeds thereof into the county court of M. county.²

¹ Form in *Spaulding & Sons v. Overmire*, 40 Neb. 21.

² Form in *Schwanck v. Davis*, 25 Neb. 196.

Under a general denial any defense may be proved. *Dewey v. Bobbitt*, 79 Kan. 505; *Street v. Morgan*, 64 Kan. 85; *White v. Gemeny*, 47 Kan. 741; *Holmberg v. Dean*, 21 Kan. 67; *Bailey v. Bayne*, 20 Kan. 657; *First Nat. Bank of Sallisaw v. Barbour*, 21 Okla. 237; *Payne v. McCormick Harvesting Machine Co.*, 11 Okla. 318; *Robinson v. Peru Plow & Wheel Co.*, 1 Okla. 140; *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20; *Best v. Stewart*, 48 Neb. 859; *Jenkins v. Mitchell*, 40 Neb. 664; *Merrill v. Wedgwood*, 25 Neb. 283; *Aultman, Miller & Co. v. Stichler*, 21 Neb. 72; *Richardson v. Steele*, 9 Neb. 483.

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Under a general denial the defendant may show that someone other than the plaintiff is the owner and entitled to the possession of the property claimed, and thus show that the detention by the defendant is not wrong against the plaintiff. *Kennett v. Fickel*, 41 Kan. 211.

Under a general denial, a sheriff may prove that the mortgage to plaintiff was a fraud upon the creditors of the failing firm. *Miami County National Bank v. Barkalow*, 53 Kan. 68.

Under a general denial in an action by a mortgagee for the possession of mortgaged property, the defendant in possession thereof may, for the purpose of defeating the plaintiff's right of recovery, prove a sale of the property by her to the plaintiff subsequent to the execution and delivery of the mortgage, and his refusal to take the goods and pay her the contract price. *Deford v. Hutchison*, 45 Kan. 318.

Upon a plea of general denial the defendant may have affirmative relief in damages. *Creighton v. Newton*, 5 Neb. 100.

Under a general denial, defendant may show that plaintiff at the commencement of the suit was, and still is indebted to him for labor in an amount equal to the amount due on the note. *Davis v. Culver*, 58 Neb. 265.

Under a general denial a defendant may prove and recover any items of damage properly allowable to him in such an action. *Schrandt v. Young*, 62 Neb. 254.

Under a general denial the defendant may defeat a recovery by the plaintiff by showing that it is a foreign corporation without authority to carry on business in the state and is not entitled to maintain that or any other action in the courts of the state. *Colean v. Johnson*, 82 Kan. 655.

Under a general denial, a defendant may prove on the trial that he does not wrongfully detain the property, by introducing evidence tending to show that his detention of the same is rightful. *Yandle v. Crane*, 13 Kan. 258.

Proof of the ratification by the principal of the unauthorized acts of the agent was competent in an action of replevin under an answer of general denial. *Johnson v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68.

A mere denial by the defendant in his answer of the facts stated in the petition is not an assertion of ownership of the property; and does not waive a demand where such demand is necessary before bringing suit. *Peters v. Parsons*, 18 Neb. 191.

The defendant may plead his defenses specifically; and when he does, his answer will be subject to the ordinary rules of pleading in other civil cases. *Randall v. Gross*, 67 Neb. 255.

And if the new matter so pleaded constitute an affirmative defense the plaintiff must file a reply thereto or such new matter will be taken as true. *Westover v. Vandoran*, 29 Neb. 652.

An answer containing an allegation that the property was not unlawfully detained by the defendant, nor was plaintiff entitled to the

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immediate possession thereof, states a defense and is not demurrable. *B. & M. Ry. Co. v. Young Bear*, 18 Neb. 494.

That the plaintiff improvidently disposed of the property at a price much below its value, cannot be set up as a defense to the action. *Bartlett v. Ridgley National Bank*, 70 Kan. 126.

The truthfulness of the replevin affidavit cannot be raised by motion; it must be by answer. *Perryman v. Brown*, 25 Okla. 138.

It is a complete defense to sureties sued upon a replevin bond that the court was without jurisdiction to render the judgment in replevin or that such judgment was obtained by fraud. *McBrayer v. Jordan*, 73 Neb. 483.

A defendant in replevin, under an answer alleging that he is the owner of the property and that he does not unlawfully detain the same, may prove that a mortgage under which the plaintiff claims title and possession was a forgery. *Gandy v. Pool*, 14 Neb. 98.

Where a defendant in replevin qualifies a general denial in his answer by pleading specially that the title to the property in dispute is in him, he waives the technical defense that he was not in possession of it at the beginning of the action. *McGinley v. Wirthle*, 72 Neb. 602.

A replevin action against a tenant for the possession of grain due from him as rent may be defeated by a showing that the title and right to possession is in a third person. *Northup v. Bathrick*, 80 Neb. 36.

Where property has been delivered to the plaintiff in replevin and defendant's answer is a general denial, it is not necessary that such answer contain a prayer for return in order to sustain a judgment for return of the property or its value. *Ulrich v. McConaughy*, 63 Neb. 10.

To sustain a judgment in replevin in favor of an officer who claims the right of possession by virtue of a seizure in an attachment action, the proof should show his official character and the proceedings and process under which he acted and claims possession. *Graham v. Shaw*, 38 Kan. 734.

The pendency of an action of replevin for the same property between the same parties in the same court is a good defense against the prosecution of a second action of replevin. *Turner v. Reese*, 22 Kan. 225.

An answer in replevin setting forth that the property in controversy is the property of a third person, and that the defendant as sheriff has levied an attachment on it, and holds it as the property of said third person, is in effect only a general denial, and needs no reply. *Wilson v. Fuller*, 9 Kan. 121.

Where goods are replevied by A. from a sheriff, who holds them by virtue of an execution against B., an answer alleging that said goods were in fact the property of B. when seized, raises a material issue, and, if true, constitutes a good defense to the action. *Hall v. Jenness*, 6 Kan. 216.

Where a defendant in a replevin action places his defense upon title in himself and the right of possession incident thereto and does not rely on want of demand by the owner, and it appears that a demand would

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have been vain and unavailing if made, no proof of demand and refusal is required. *Raper v. Harrison*, 37 Kan. 243; *Greenawalt v. Wilson*, 52 Kan. 109.

Set-off. One who wrongfully takes and detains personal property of another cannot plead a set-off as a defense in an action of replevin brought by the owner for the recovery of such property. *Kennett v. Fickel*, 41 Kan. 211.

The allegation of the execution of a chattel mortgage and the transfer thereof by an indorsement thereon alleged in a petition, is to be taken as true if the answer is not verified by affidavit. *Nutt v. Humphrey*, 32 Kan. 100.

An answer by one of several defendants disclaiming any right, title or interest in the property presents no issue upon the allegations of the petition. *Zeisler v. Bingman*, 9 Kan. App. 447.

Special defenses peculiar to cases. *Barnhart v. Ford*, 37 Kan. 520; *Blaker v. Sands*, 29 Kan. 393.

Form of answer claiming right to possession by reason of attachment proceedings by creditors. *Kaufman v. Coburn*, 30 Neb. 672.

Form of answer to action of replevin for possession of property described in a chattel mortgage. *Nutt v. Humphrey*, 32 Kan. 100, 102.

Form of answer by the sheriff who held the property under a writ of attachment. *Armstrong v. Lynch*, 29 Neb. 87.

Form of answer pleading specifically the facts constituting a defense. *Westover v. Vandoran*, 29 Neb. 652.

CHAPTER C.

VENDOR'S LIEN.

892. Answer to action to foreclose a vendor's lien setting up tender and demand for deed, and alleging failure on part of plaintiff to make deed.

892. ANSWER TO ACTION TO FORECLOSE A VENDOR'S LIEN SETTING UP TENDER AND DEMAND FOR DEED, AND ALLEGING FAILURE ON PART OF PLAINTIFF TO MAKE DEED.

Comes now H. L. Y. and J. O. Y. and for answer to plaintiff's petition denies each and every allegation in plaintiff's petition not hereinafter admitted.

Defendants admit plaintiff's corporate existence. Further answering defendants allege that the original deed conveying said lot from P. L. Co. to G. W. M., through whom plaintiff acquired its title, 19.., and filed, 19.., in the office of register of deeds of said county and there recorded, contained certain restrictions, a copy of which is as follows: (here insert restrictions). That D. addition was specially designed for residence purposes and to eliminate business excepting upon U. avenue about 5 blocks north of the property in controversy and the same was so laid out, put upon the market and sold under such general plan, scheme and advertisement, and each deed contained the same provisions as this one to insure the maturity or fruition and perpetuity of such general plan which still continues. That said restrictions have been enforced and continue to be in force by virtue of the fact that no external or internal conditions have arisen to alter or defeat the object and plans of said restrictions and the same have been perfected and continue to be observed and enforced.

Defendants state that J. R. obtained a written agreement to purchase the property in controversy which was executed

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and delivered by plaintiff and J. R. and duly recorded on the day of, 19.., a copy of which is as follows: (here insert agreement).

Defendants allege that J. R. made the following payments upon said contract, never making any defaults thereon, to-wit: (here insert payments).

Defendants allege that on the day of, 19.., the said J. R. and A. R., his wife, for a valuable consideration sold and assigned all his right, title and interest in and to the contract and of said lot, and signed and acknowledged the following assignment thereon endorsed on the back of said instrument delivering the said instrument, all papers and receipts connected with said contract, together with the possession of said lot to H. L. Y.; that said assignment was in words as follows:

“For a valuable consideration J. R. and A. R., husband and wife, assign the property contracted herein and said contract to H. L. Y. and all interest thereof.”

Defendants allege they continued to occupy said premises under said assignment from that time until the present.

That the fact of said assignment was immediately made known to plaintiff who consented thereto and acquiesced therein and who continued for about two years to receive the monthly payments of these defendants, acquiescing in writing even by giving said receipts and accepting said money of said defendant assignees of said contract.

Defendants allege that since the purchase of said contract the following payments have been made by these defendants, to-wit: (here insert payments).

That on the day of, 19.., H. L. Y. tendered the plaintiff \$., being the full amount of principal and interest claimed by plaintiffs on said contract, and demanded the deed contracted for in said contract, which was refused by plaintiffs.

That on the day of, 19.., defendants tendered \$., offering the difference between \$. and \$. to cover any mistake in figuring the exact amount

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due on said contract and demanded a deed to said premises which was refused.

That on the day of, 19.., defendants tendered to plaintiff \$..... or any portion thereof as plaintiff would figure to be due on said contract and demanded a deed as provided in said contract, but the same was refused.

Defendants allege that at the time of said tender, the conditions of said M. deed had placed such restrictions upon the use and occupancy of said real estate and made such easements, rights and interests on said lot by all other lot owners in D. and cast such clouds upon the title that plaintiff could not give a deed to said property as provided in said contract and the same was broken by plaintiff because of the inability of plaintiff to perform the same and was not entitled to any part of said consideration until said plaintiff could give a deed conveying a fee-simple title clear of all incumbrances and is entitled to no interest on said principal because it was not entitled to the principal at that time; that defendant and their assigns paid upon said consideration the sum of \$..... as aforesaid, and there is still unpaid the sum of \$.....

Defendants allege that at the time of said tender, plaintiffs were unable to give a clear title and that over 300 people in D. owned an interest claim and easement in said property and that it would have required \$..... to clear the said title in purchasing quit claim deeds for the same. That by reason of said clouded title the value of said premises was damaged in the sum of \$.....

Defendants allege they have kept said tender good and been ready, able and willing at all times to pay the amount due at the time of said tender upon delivery of a deed conveying a fee simple title clear of incumbrances and are still willing to pay said amount of \$..... for such deed in order to avoid litigation, though defendants have suffered said loss and damage aforesaid.

Defendants allege that they have paid all taxes, have installed electric lights, wiring the house for same, and placed fixtures therein; they put in a new porch floor, new walks,

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painted the house and pointed and painted the foundations and chimneys and papered three rooms this spring, besides planting over \$. worth of shrubbery; that said place is worth \$. and will rent for \$. per month, is not going to waste and will sell for a large sum in excess even of plaintiff's demand.

Defendant denies that plaintiff had any right to pay insurance or taxes for the reason that its lien was released by a refusal to accept said tender and the same if made was a mere volunteer, these defendants desiring to carry their own risk; defendants have also paid all taxes excepting those delinquent next, which defendants expect to pay, but not before said date.

Wherefore defendants pray that said contract be declared to have been fully paid and satisfied by the said payments actually made and damages occasioned and the plaintiffs ordered and directed to make a deed to defendant, H. L. Y., and the sheriff directed to make said deed for said plaintiff upon their neglect and refusal and for such other relief as may be just and equitable.¹

¹ From form in record in Portsmouth Savings Bank v. Yeiser, 81 Neb. 343.

CHAPTER CL.

WARRANTY.

893. Answer to action for damages for breach of warranty of a horse.

893. ANSWER TO ACTION FOR DAMAGES FOR BREACH OF WARRANTY OF A HORSE.

Defendant denies that the sum of dollars, or any other sum, was paid by the plaintiff to the defendant for said horse, but alleges that plaintiff merely exchanged the said horse, K. of the S., for a certain jack, and a horse, and a town lot in the town of W., Nebraska, and the plaintiff's note for dollars, and that the said plaintiff finally traded to this defendant for said note a couple of mares and a couple of colts; that no money was ever received by defendant from plaintiff for said horse, and that the value of all the property received by defendant in the exchange did not exceed the sum of dollars; that the amount of dollars was fixed by plaintiff and defendant as a trading price, the same being fictitious and wholly regardless of the true value of the property exchanged, and largely in excess of the same.

Defendant further answering says that he denies that he warranted the said horse as alleged in plaintiff's petition, and this defendant denies that the plaintiff relied upon any warranty or statements made by the defendant, or that he was induced thereby to trade for the said horse, and defendant alleges that prior to and at the time of the trade for said horse the said plaintiff had knowledge that the said horse, K. of the S., was not registered in stud-book of England, but that said horse was eligible to registry upon the mere payment of the registration fee of one pound or about dollars.

Defendant further answering says that he denies each and

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every allegation in said petition contained, not herein expressly admitted or denied.¹

¹ Form in *Watson v. Roode*, 43 Neb. 348.

A defense in which it is sought to rely upon certain conditions of a contract must be pleaded. *Westinghouse Co. v. Meinel*, 72 Neb. 623.

CHAPTER CII.

REPLIES.

- 893a. Reply denying new matter.
- 894. Reply denying allegations of certain paragraphs of answer.
- 895. Reply, consisting of general denial to answer to counts of the petition.
- 896. Reply to new matter in response to counterclaim.
- 897. Reply to answer to a petition on executor's bond for failure to pay a distributive share.
- 898. Reply by plaintiff in action for express charges to answer setting up counterclaim for damages resulting from the negligence of an express company.
- 899. Reply to answer alleging cancellation of insurance policy.
- 900. Reply to answer setting up a release alleging that said release was obtained by fraud and misrepresentation. (Reply to form No. 869.)
- 901. Reply to answer in an action of replevin for the possession of certain promissory notes.
- 902. Reply in action by servant for damages for injuries caused by breaking of a defective telephone pole.
- 903. Reply to an answer on a fire insurance policy.

893a. REPLY DENYING NEW MATTER.

(Venue, court, title of action.)

Now comes plaintiff, and for reply to the new matter alleged in defendant's answer filed herein, denies each and every allegation in said answer contained.

Wherefore plaintiff asks judgment as prayed in his petition.¹

¹ A reply must be made to all the material allegations of new matter contained in the answer or they will be taken as true. *Culbertson Irrigating & Water Co. v. Cox*, 52 Neb. 684; *Harlan County v. Hogsett*, 60 Neb. 362; *Davis v. First Nat. Bank of Grinnell*, 57 Neb. 373; *Burnet v. Cavanagh*, 56 Neb. 190; *National Lumber Co. v. Ashby*, 41 Neb. 292; *Williams v. Evans*, 6 Neb. 216; *Ballinger v. Lantier*, 15 Kan. 457; *Baker v. L. C. Van Ness & Co.*, 25 Okla. 34.

No reply is necessary to an answer which, though verified, amounts

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to nothing more than a denial. *Burton v. Harvey Co. Sav. Bank*, 28 Kan. 279; *Dreilling v. First National Bank of Battle Creek*, 43 Kan. 197; *Netcott v. Porter*, 19 Kan. 131.

Though the evidence disproves the material allegations of new matter in an answer, such evidence will be disregarded, unless such new matter is denied by a reply. *Grant v. Bartholomew*, 57 Neb. 673.

The office of a reply is to deny the facts alleged as defenses in the answer, or to allege facts in avoidance of such defenses. *Piper v. Woolman*, 43 Neb. 280; *Plummer, Perry & Co. v. Rohman*, 61 Neb. 62; *Solt v. Anderson*, 62 Neb. 153.

A plaintiff, in replying to new matter set up in an answer, may allege new matter, not inconsistent with the petition, constituting a defense to such allegations contained in the answer. *Mollyneaux v. Wittenberg*, 39 Neb. 547; *Cobbey v. Knapp*, 23 Neb. 579; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621.

New matter in a reply must be responsive and defensive to new matter pleaded in the answer. If it is a departure therefrom it should upon motion or objection be stricken out or disregarded. *Hallner v. Union Transfer Co.*, 79 Neb. 215.

Where a reply is filed which constitutes a departure, the defendant should take advantage of the defect by moving to strike the reply from the files, and failing to do so he waives the defect. *St. Paul Fire & M. Ins. Co. v. Mountain Park Stock Farm Co.*, 23 Okla. 79.

The plaintiff cannot allege facts in a reply to a counterclaim of defendant which constitutes a counterclaim on his part. *Beakey v. Vander Meerschen*, 78 Kan. 538.

Where a petition is for money had and received, and the answer pleads payment by check, and the reply alleges facts negating and disputing the payment alleged in the answer, the reply is not inconsistent with the petition, and it is error to strike out its allegations. *Patterson v. First Nat. Bank of Humboldt*, 73 Neb. 384.

New matter set up in an answer which does not constitute a defense to the plaintiff's petition, does not require a reply. *West v. Cameron*, 39 Kan. 736; *Simpson v. Kimberlin*, 12 Kan. 443.

A reply which denies every "material" allegation of the answer is sufficient. *Miller v. Brumbaugh*, 7 Kan. 215; *Anthony v. Stinson*, 4 Kan. 180.

A reply which states that an answer does not state facts sufficient to constitute a defense to plaintiff's cause of action stated in his petition is not a denial of the matters pleaded in the answer. *Sutton v. Sutton*, 60 Neb. 400.

A reply alleging that the defendant's counterclaim did not accrue within the period provided by law for asserting such claim, and containing no facts from which the conclusion is deduced, tenders no issue and such allegation may be entirely disregarded. *Pinkham v. Pinkham*, 61 Neb. 336.

A different cause of action cannot be set up in the reply. *Savage v. Aiken*, 21 Neb. 605.

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A failure to state a cause of action in the petition cannot be cured by averments in the reply. *Covey v. Henry*, 71 Neb. 118.

But where no objection is made on that ground in the district court, and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived. *Farmers & Merchants Ins. Co. v. Dobney*, 62 Neb. 213; *Gregory v. Kaar*, 36 Neb. 533.

New matter in the reply which the plaintiff is forced to plead in order to meet the allegations of the answer will not constitute departure if it does not contradict the facts stated in the petition and if it is not adopted as a new basis for relief in place of the cause of action presented by the petition. *Hunter Milling Co. v. Allen*, 74 Kan. 679.

Where the plea of *ultra vires* is interposed by a defendant corporation in its answer, facts not inconsistent with allegations of the petition may be pleaded in the reply, in the nature of an estoppel or to show that the corporation was, under the circumstances, empowered to enter into the contract, the obligation of which is sought to be avoided. *Horst v. Lewis*, 71 Neb. 365, 370.

Matter in the reply in explanation or avoidance of the facts stated in the answer does not constitute a new cause of action and is not on that ground subject to demurrer. *Anderson v. Imhoff*, 34 Neb. 335.

The defendant waives the objection that no reply was filed where the case is tried on the theory that new matter in the answer was denied. In re Estate of Cheney, 78 Neb. 274; *Chicago, R. I. & Pac. Ry. Co. v. Frazier*, 66 Kan. 422; *Kepley v. Carter*, 49 Kan. 72; *Cooper v. Machine Co.*, 37 Kan. 231; *Bashor and Marx v. Nordyke & Marmon Co.*, 25 Kan. 154.

It is not an abuse of discretion to permit a reply to be filed after verdict in a case tried by both parties without objection, upon the theory that the allegations of the answer are denied. *Whitney v. Preston*, 29 Neb. 243.

A reply to an answer denying each and every allegation contained in the answer inconsistent with the statements of plaintiff's petition is defective and an insufficient denial of the allegations of the answer. *Herdman v. Marshall*, 17 Neb. 252.

A reply which does not deny the defense set up by defendant, but which amounts to an avoidance, does not relieve plaintiff of the necessity of proving the avoidance as set up. *Felix v. St. Louis and San Francisco Ry. Co.*, 60 Kan. 467.

Allegations in a reply are, under the code system of pleading, to be deemed controverted by the defendant without any formal denial of the same on the part of the defendant. *Board of Education v. Shaw*, 15 Kan. 35.

Where after the defendant files an answer asking affirmative relief the plaintiff dismisses his petition, the plaintiff should be allowed to file a reply in the nature of an answer to defendant's answer. *Winters v. Means*, 33 Neb. 635.

The allegations of any appointment or authority, appearing as new

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894. REPLY DENYING ALLEGATIONS OF CERTAIN. PARAGRAPHS OF ANSWER.

Comes now the plaintiff and for reply to the allegations of the answer filed herein denies the allegations of the 3rd, 4th, 5th and 6th paragraphs thereof.²

895. REPLY, CONSISTING OF GENERAL DENIAL TO ANSWER TO COUNTS OF THE PETITION.

Now comes plaintiff, and for reply to the answer of the defendant to the first count of the petition, denies each and every allegation in said answer contained.

matter in a reply, shall be deemed to be controverted by the adverse party as upon direct denial verified by the affidavit of the party, his agent or attorney, without the filing of any pleading. *Continental Insurance Co. v. Pearce*, 39 Kan. 396.

Where, after reply, an amended answer is filed setting up the defense interposed in the original answer and, in addition, facts which constitute a new and distinct defense, the plaintiff may reply anew if he so elects, but if he does not, the reply to the original answer will not stand as a reply to such new or additional defense. *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461.

Where damages were claimed by the defendant in his answer for a failure to complete the buildings in the time specified, the plaintiff in his reply alleged that the delay was caused by certain acts of the defendant (stating them) and not by the fault of the plaintiff, held, properly pleaded. *Hibbard v. Talmage*, 32 Neb. 147.

Denial of "each and every allegation of new matter set up in defendant's answer," and of "each and every other part of same, except such allegations of said answer as may be admissions of plaintiff's petition," while subject to motion to strike or to make more specific, being neither a general or specific denial, is sufficient to prevent a judgment for defendant on the allegations of the answer. *Pecha v. Kastl*, 64 Neb. 380.

A reply to an answer denying each and every allegation contained in the answer inconsistent with the statements of plaintiff's petition is defective, and an insufficient denial of the allegations of the answer, and, upon a motion to make more specific, will be held bad, and unless amended so as to conform to the code will be treated as no denial. But if upon such denial the parties go to trial treating it as a sufficient denial, it must be so treated in all stages of the case. *Gross v. Scheel*, 67 Neb. 223; *Herdman v. Marshall*, 17 Neb. 252.

Where a plaintiff in an action to enjoin trespass claims under a lease, an allegation in an answer to such petition, that such lease has been canceled and terminated, is new matter which must be taken as true if not denied by a reply. *Stanser v. Cather*, 82 Neb. 136.

² From form in record in *Riley v. Cudahy Packing Co.*, 82 Neb. 319.

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And plaintiff, for reply to the second count of said answer, denies each and every allegation in said count contained.

Wherefore plaintiff asks judgment as prayed in his petition.

896. REPLY TO NEW MATTER IN RESPONSE TO COUNTER-CLAIM.

Now comes plaintiff and admits that he bought the goods from defendant set out in his account and counterclaim, and paid the amount credited on said account, and paid the additional amounts as set out in an account hereto attached, marked "exhibit B," and was allowed certain other credits thereon as set out in said "exhibit B," all of which said defendant ordered, agreed to, and accepted; and at the time defendant bought said two cars of potatoes, as alleged in plaintiff's petition, it was owing defendant only dollars, as will appear in "exhibit B," and which amount was, and is, credited to defendant in plaintiff's petition, on said potatoes.

Wherefore plaintiff asks judgment as prayed in its petition.

897. REPLY TO ANSWER TO A PETITION ON EXECUTOR'S BOND FOR FAILURE TO PAY A DISTRIBUTIVE SHARE.

Now comes plaintiff, and for reply to defendant's answer herein, denies each and every allegation of new matter therein contained.

Further replying, plaintiff states that on the day of, 19..., the executors of the estate of B. P. C., made a pretended final settlement of said estate, but it avers that said pretended settlement was false and fraudulent and procured by false and fraudulent representations made to the court, whereby said court was deceived. Plaintiff further says that in said pretended final settlement and in all their annual settlements said executors represented to the court that they had paid to W. J. M., trustee for J. W. C., as shown in their settlement, 19..., and as directed by

REPLIES.

the probate court the sum of dollars, which representation was false and fraudulent, and whereby said court was deceived and misled. Plaintiff asks that all of said settlements be set aside and for naught held for the reasons aforesaid, and for all other proper relief.

898. REPLY BY PLAINTIFF IN ACTION FOR EXPRESS CHARGES TO ANSWER SETTING UP COUNTERCLAIM FOR DAMAGES RESULTING FROM THE NEGLIGENCE OF AN EXPRESS COMPANY.

Now comes plaintiff and for reply to defendant's answer denies each and every allegation of new matter in said answer contained.

Further replying plaintiff says that at the time of receiving said jack for the purpose of forwarding him to W., ..., the plaintiff and defendant entered into a written contract by which it was agreed that plaintiff should not be liable for any damage to said property caused by the detention of any train of cars upon which said animal should be placed for transportation, nor for the neglect or refusal of any railroad company to receive and forward same and by which contract it was further agreed that said animal should be forwarded to its destination entirely at defendant's risk.

Plaintiff says that the said jack carried by it to W., ..., was not the same jack which had been bargained for by J. L. B., but was another and a different jack and was much older and of much less value than the one so bargained for by said B., and that even if there was any unnecessary delay in transit resulting from the delays in the movements of trains, etc., upon which same was loaded, plaintiff is not liable therefor, and that said animal was shipped at defendant's risk.

899. REPLY TO ANSWER ALLEGING CANCELLATION OF INSURANCE POLICY.

Now at this day comes plaintiff, and, for reply to defend-

REPLIES.

ant's answer, says: that on or about the day of, 19.., the said policy of insurance was in possession of the N. B. of C., in, ...; that the agents of defendant in the city of, where said bank has its place of business, without any notice to the insured that said policy of insurance had been or would be canceled, and without the knowledge of plaintiff, received from said bank said policy of insurance, under promise that the said policy should remain in force until the same or some other policy equally good and for the same amount should be returned to said bank; that neither the same nor any other policy in place thereof was afterwards delivered to said bank.

Further answering, plaintiff denies each and every allegation, matter, fact and thing in the answer alleged, not herein expressly admitted, and, having fully replied, asks for judgment as in petition prayed.

900. REPLY TO ANSWER SETTING UP A RELEASE ALLEGING THAT SAID RELEASE WAS OBTAINED BY FRAUD AND MISREPRESENTATION. (REPLY TO FORM NO. 869.)

Now comes plaintiff, and, for reply to the answer herein, denies the allegations thereof, except as hereinafter specially admitted.

And for reply to the third alleged defense this plaintiff avers that the alleged agreement set forth as the third defense in said answer was without any consideration and void.

And plaintiff doth further aver that the said alleged agreement was obtained from this plaintiff by the gross fraud and misrepresentations and impositions by the defendant and its agents, practiced upon the plaintiff at the time of the alleged making thereof.

That, at the time of the alleged making thereof, this plaintiff was in the deepest distress and mental and bodily pain and anguish, caused by the injuries set forth in his petition; that he was at said time not of contracting mind, and was unable through his bodily and mental condition to under-

REPLIES.

stand or comprehend the contents of said agreement, and did never assent to the terms thereof; that defendant by its agents, R. W. G. and W. E. W. with the fraudulent purpose and design of cheating and defrauding the plaintiff out of his right of action set forth in his petition, and well knowing that plaintiff was incapable by reason of his mental pain and bodily suffering to understand or comprehend the contents or nature of said alleged agreement, by undue influence, taking advantage of plaintiff's said condition, induced plaintiff to sign said agreement without knowing or understanding the contents thereof.

That, at the time of the alleged making of said agreement, the plaintiff was of weak and enfeebled mind by reason of said injuries, and his will was subjected to that of defendant's said agents, and plaintiff did not have mental will or understanding to oppose the will of defendant's said agents, and defendant's said agents, fraudulently taking advantage of the weak and enfeebled condition of plaintiff's mind and will, for the purpose of cheating him, as aforesaid, did, by reason of plaintiff's said enfeebled condition of mind and body, by subjecting his will to theirs, induce and cause plaintiff to sign said alleged agreement. Wherefore, plaintiff says said alleged agreement is of no effect and void, and he prays judgment as in his petition.

901. REPLY TO ANSWER IN AN ACTION OF REPLEVIN FOR THE POSSESSION OF CERTAIN PROMISSORY NOTES.

Now comes the above named plaintiff, and for a reply to the new matter contained in the answer of defendant, says that he denies each and every allegation therein contained.

Further replying to the new matter aforesaid and in said answer contained, this plaintiff says that C. K. had no title at the time or any other time to said paper and could not transfer any, all of which defendant well knew or by the exercise of ordinary diligence could have learned prior to and at the time of his alleged purchase.

REPLIES.

Further replying, this plaintiff says that whatever transaction the defendant had with said K. whereby he wrongfully obtained from said K. the possession of the paper in the petition described was a loan and not a sale. That then and there said loan was for the sum of dollars, and that defendant was by the terms of said loan to receive and charge interest for a greater amount than that allowed by law, and said loan was at the time when made and is affected with usury, and was and is illegal, and defendant has and had no right to the possession of said paper.

Wherefore, and by reason of the premises, plaintiff prays for judgment for the possession of the papers heretofore described, for costs and for such other and further relief as to the court may seem just and proper.

902. REPLY IN ACTION BY SERVANT FOR DAMAGES FOR INJURIES CAUSED BY BREAKING OF A DEFECTIVE TELEPHONE POLE.

Comes now the plaintiff and for his reply to the defendant's answer filed herein denies each and every allegation in said answer contained, except such allegations that admit the truth of allegations contained in plaintiff's petition.

Replying further to defendant's answer the plaintiff alleges that the telephone line defendant was constructing, as alleged in paragraph 4 of plaintiff's petition, was a new line, and was constructed by two gangs or sets of workmen, one gang digging the holes and setting the telephone poles in the ground, and the second gang, being the linemen, following later and stringing the wires; and each of said gangs worked separately, entirely independent of the other, and each working under the direction and supervision of its own foreman; that plaintiff was one of the second gang stringing the wires upon the poles put up by the first gang, and as one of the second gang the plaintiff had nothing to do with the selection, inspection or setting up of the poles on the said line; that the first gang of workmen engaged in setting up the

REPLIES.

poles preceded the second gang by a number of days, and that the plaintiff had no opportunity whatever of knowing anything about the work performed by the first gang, or of the kind of poles they set up.

Wherefore the plaintiff prays for judgment as prayed for in his said petition filed herein.³

903. REPLY TO AN ANSWER ON A FIRE INSURANCE POLICY.

Comes now the plaintiff, and for reply to the several paragraphs of defendant's answer herein, denies each and every allegation therein contained.

And, for a further and more complete reply herein to defendant's answer, says that he never executed or delivered the pretended application for insurance set forth in defendant's answer and marked "exhibit A"; that he never either directly or indirectly made any representations to defendant that his real estate mentioned was or was not mortgaged or incumbered, neither did he ever authorize the same to be made to defendant, or to anyone acting for and in behalf of said defendant; that E. D. P., the solicitor for said insurance company, defendant, desiring to insure the house and furniture of the plaintiff, represented to the plaintiff that he was the agent of the insurance company, defendant, and that all the company desired was the size of the house when built; that E. D. P., for said defendant, took a blank piece of paper and took down the size of the house when built, turned to the plaintiff and said, "That is all. When you come in again your policy will be ready"; that the plaintiff soon thereafter called, paid the full premium thereon, to-wit, ... dollars, and, being unable to read or write, took the policy home; that he never signed any application of any kind or description to said defendant, neither did he ever authorize any one in his behalf to sign such application; that his application for the insurance was oral, and was not reduced to writing by the

³ From form in record in *Ault v. Nebraska Telephone Co.*, 82 Neb. 434. For petition, see form No. 502.

REPLIES.

defendant; that in obtaining the insurance policy, he did not conceal or attempt to conceal any debt or lien against him; that E. D. P., who was acting for and on behalf of the insurance company, defendant, and from whose hand he received the policy, had personal knowledge of the financial condition of the plaintiff at the time of the issuing and delivering of the insurance policy, and for a long time prior thereto.⁴

⁴ Form in *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486.

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CHAPTER CIII.

ATTACHMENT.

- 904. Affidavit for attachment (Oklahoma).
- 905. Same—Another form.
- 906. Affidavit for attachment (Nebraska).
- 907. Affidavit for attachment (Kansas).
- 908. Allegations as ground of attachment that defendant has disposed of his property to hinder or defraud his creditors.
- 909. Affidavit in attachment alleging transfer of property.
- 910. Affidavit for attachment where debt is not due.
- 911. Motion to dissolve an attachment.
- 912. Same—Another form.
- 913. Motion to discharge claiming property as exempt.
- 914. Affidavit for service by publication.
- 915. Bond in attachment.
- 916. Attachment bond—Oklahoma.
- 917. Forthcoming bond in attachment.
- 918. Bond to discharge attachment.

904. AFFIDAVIT FOR ATTACHMENT (OKLAHOMA).

F. H. T., plaintiff in the above entitled action, being first duly sworn on oath, deposes and says:

1. That the plaintiff has commenced an action against F. L. W. in the court of county, to recover the sum of dollars, now due and payable to plaintiff, being the amount which the defendant agreed to pay upon the delivery of certain goods and merchandise sold by the plaintiff to the defendant.

2. Affiant further states that such claim is just and that the plaintiff ought to recover from the defendant the sum of dollars.

3. That said defendant fraudulently contracted the debt and incurred the liability and obligation for which the above

ATTACHMENT.

named suit has been brought and has failed to pay the price and value of the articles and things delivered which by said contract he was bound to pay upon delivery.

F. H. T.

Subscribed and sworn to, etc.¹

905. SAME—ANOTHER FORM.

State of Oklahoma, }
..... county, } ss.

F. K., being duly sworn, says that he is the plaintiff (or agent, attorney or officer of the company, if a corporation) in the above entitled action.

1. That the plaintiff has commenced its action against the defendant O. G. to recover the sum of dollars now due for goods, wares and merchandise purchased of plaintiff and delivered to her.

2. That said claim is just, is due and is wholly unpaid, the amount of which said affiant believes plaintiff ought to recover of the defendant is dollars.

3. That the defendant so conceals herself that a summons cannot be served upon her.

That the defendant is about to convert her property, or a part thereof into money, for the purpose of placing it beyond the reach of her creditors.

That the defendant is a non-resident of the State of Oklahoma.

F. K.

Subscribed and sworn to, etc.²

906. AFFIDAVIT FOR ATTACHMENT (NEBRASKA).

H. C. V., attorney for plaintiff, being first duly sworn, deposes and says:

¹ Adapted from facts in *Thwing v. Winkler*, 13 Okla. 643.

Statement in affidavit of attachment in the language of the statute that the debt was fraudulently contracted, etc., is sufficient to authorize the issuance of attachment. *Thwing v. Winkler*, 13 Okla. 643.

² Adapted from form and facts in *Raymond v. Nix-Halsell & Co.*, 5 Okla. 656, 663.

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1. That plaintiff has commenced an action against R. N. H. in the district court of B. county, to recover the sum of dollars now due and payable to the plaintiff upon a certain promissory note made by the defendant R. N. H. for valuable consideration to C. E. R. and endorsed by C. E. R. to the plaintiff.

2. Affiant further says that said claim is just and plaintiff ought as he believes to recover thereon the sum of dollars, with interest from this date at per cent.

3. That the defendant, R. N. H., is a non-resident of the State of Nebraska.

H. C. V.

Subscribed in my presence and sworn to, etc.³

907. AFFIDAVIT FOR ATTACHMENT (KANSAS).

(Title of action).

State of Kansas, }
County of, } ss.

H. D. C., plaintiff (or attorney or agent for plaintiff), being first duly sworn, deposes and says:

1. That the plaintiff has commenced an action against the defendant O. C. in the court of county, to recover the sum of dollars, being the amount promised to be paid in a promissory note dated the day of, 19.., and due one year after date.

2. Affiant further says that the claim of plaintiff is just and that the amount he ought to recover thereon is dollars due on the day of, 19..

3. That the defendant has assigned, removed or disposed of, or is about to dispose of his property, or a part thereof, with intent to defraud, hinder or delay his creditors.

H. D. C.

Subscribed and sworn to, etc.⁴

³ From form in record in McKillip v. Harvey, 80 Neb. 264.

⁴ Adapted from form and facts in Clayton v. Clark, 76 Kan. 832.

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908. ALLEGATIONS AS GROUND OF ATTACHMENT THAT DEFENDANT HAS DISPOSED OF HIS PROPERTY TO HINDER OR DEFRAUD HIS CREDITORS.

That the said defendant, O. O. M., had sold and conveyed and otherwise disposed of his property with the fraudulent intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts; that the said defendant, O. O. M., was about to make a sale or conveyance and disposition of his property with the fraudulent intent to cheat and defraud his creditors, and to hinder and delay them in the collection of their debts; and was about to remove his property with the intent and to the effect of cheating and defrauding his creditors, and hindering and delaying them in the collection of their debts.⁵

⁵ Form in *Marbourg v. Lewis Cook Mfg. Co.*, 32 Kan. 629.

An affidavit for an attachment setting forth the grounds therefor in the language of the statute is sufficient. *Burnham v. Ramge*, 47 Neb. 175; *Tallon v. Ellison*, 3 Neb. 68; *Ellison v. Tallon*, 2 Neb. 14; *Reyburn v. Brackett*, 2 Kan. 221; *Dunn v. Claunch*, 13 Okla. 577.

An affidavit setting forth the nature of the plaintiff's claim, that it is just, the amount which the affiant believes plaintiff ought to recover, and the existence of one or more statutory grounds for the writ in the language of the Code of Civil Procedure is sufficient. *McDonald v. Marquardt*, 52 Neb. 820.

An original affidavit in attachment is defective and insufficient (1) when it states the plaintiff's claim so indefinitely that it cannot be understood therefrom whether the claim is founded upon contract or upon tort; (2) and, if the claim is founded upon tort, when the affidavit does not state that the cause of action arose wholly within the limits of this state; (3) when the affidavit does not state that the claim is just; (4) when the affidavit does not state the amount which the affiant believes the plaintiff ought to recover. *Robinson v. Burton*, 5 Kan. 176.

The affidavit must show "the nature of the plaintiff's claim." If the claim appears in the affidavit to be one for which an attachment may issue, but the statement is not as full as may be desired, reference may be had to the petition. *Hart v. Barnes*, 24 Neb. 782.

The affidavit in addition to other allegations need not state that the defendant has property within the jurisdiction of the court subject to attachment. *Grebe v. Jones*, 15 Neb. 312.

That claim is just. An affidavit for an order of attachment is required to show that the plaintiff's claim is just. It is sufficient in such an affidavit to simply allege that it is just. It is also sufficient

SPECIAL PROCEEDINGS.

909. AFFIDAVIT IN ATTACHMENT ALLEGING TRANSFER OF PROPERTY.

State of, }
County of, } ss.

The plaintiff, the M. M. & S. Co., by S. W. C., secretary and treasurer, makes oath that the claim in this action is for

if, without such direct statement the facts concerning the plaintiff's claim, as disclosed in the affidavit, show that it is just. *Wilkins v. Tourtellott*, 28 Kan. 589; *Grotte v. Nagle*, 50 Neb. 363.

The nature of plaintiff's claim must be set out in the affidavit. In stating "the nature of the plaintiff's cause of action" in an affidavit for an attachment, it is not necessary to state the facts constituting the cause of action; a condensed statement of the general nature of the claim is a sufficient compliance with the requirements of the code of civil procedure. *Dorrington v. Minnick*, 15 Neb. 397.

The amount which plaintiff ought to recover must be stated in the affidavit. *Tootle, Hanna & Co. v. Smith*, 34 Kan. 27.

The fraudulent acts of the defendant which are relied upon as the basis of an attachment on a claim before it is due, should be set forth in the attachment affidavit. *Cox v. Peoria Mfg. Co.*, 42 Neb. 660.

The affidavit may be amended by leave of the court, even after a motion to quash the proceedings is filed, because of that particular defect. *Clarke Banking Co. v. Wright*, 37 Neb. 382; *Baker Wire Co. v. Kingman*, 44 Kan. 270; *Wells, Fargo & Co. v. Danford*, 28 Kan. 349; *Struthers v. McDowell*, 5 Neb. 491.

An affidavit in attachment which is not void, but merely defective, may be amended the same as any other pleading, process or proceeding in the case. *Reister v. Land*, 14 Okla. 34.

The affidavit may be amended so as to state formally and definitely what is already stated therein informally and indefinitely. *Burton v. Robinson*, 5 Kan. 172.

So affidavit containing merely a clerical error may be amended upon application. *Dunn v. Drummond*, 4 Okla. 461.

No new cause of attachment which existed when the action was brought, can be brought in by amendment. *Brookmire v. Rosa*, 34 Neb. 227.

Nor a cause of action different from that stated in the original affidavit on which the writ was issued. *Westover & Co. v. Van Dorn Iron Works Co.*, 70 Neb. 415.

The amended affidavit must relate back to the time of filing original affidavit. *Robinson v. Burton*, 5 Kan. 176.

An affidavit which omits to state the amount of indebtedness due from the defendant is defective merely and may be amended. Such amendment, when made, relates back to the time of the filing of the original affidavit, and the lien of the writ issued thereon is prior to that

ATTACHMENT.

a recovery of a judgment for money in the sum of dollars, and the said S. W. C., secretary and treasurer of the M. M. & S. Co., also makes oath that said claim is just, and that the M. M. & S. Co. ought, as affiant believes, to recover thereon dollars. He also makes oath that the said H. J. C., H. B. C. and M. E. C., parties composing the firm of H. J. C. & Co., defendants, are about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors; that said H. J. C., H. B. C. and M. E. C. have property and rights in action which they conceal; that the said H. J. C., H. B. C. and M. E. C.

of a junior attachment levied before such affidavit was amended. *Coyle Mercantile Co. v. Nix, Halsell & Co.*, 7 Okla. 267.

A writ of attachment which does not run in the name of "The People of the State of Nebraska," as required by the constitution, is voidable only, the defect is curable by amendment. *Livingston v. Coe*, 4 Neb. 379.

Affidavit may be made by the plaintiff, his agent or attorney. *Comp. Laws of Okla. 1909, sec. 5702; Cob. Ann. Stat. of Neb. 1911; sec. 1172; Gen. Stat. Kan. 1909, sec. 5784; Manley v. Headley*, 10 Kan. 75.

If made by agent or attorney not required to state why it is not made by the party himself. *Johnson v. Laughlin*, 7 Kan. 225.

An affidavit for attachment made by one who is in fact the agent or attorney of the plaintiff, but which fails to show that the party so making the affidavit is agent or attorney, may be amended so as to show such fact. *Tracy v. Gunn*, 29 Kan. (509) 362.

An affidavit for an attachment made by the attorney for the plaintiff, wherein he swears that he is the authorized attorney of the plaintiff in the above entitled action; that he has commenced an action, etc., where it appears from the whole affidavit that the action was brought by the plaintiff, is not void. *Jansen & Co. v. Mundt*, 20 Neb. 320.

An affidavit taken before an attorney in the case may, on motion, be stricken from the files. *Collins v. Stewart*, 16 Neb. 52; *Tootle, Hanna & Co. v. Smith*, 34 Kan. 27.

A notary public who is the attorney of one of the parties to an action is not permitted to take the affidavit of his client for the purpose of procuring an attachment. *Horkey v. Kendall*, 53 Neb. 522; *Malcom Savings Bank v. Cronin*, 80 Neb. 228.

While a notary public may not take the affidavit of his client for the purpose of procuring an attachment, the taking of an affidavit as indicated is a mere irregularity, and the affidavit is not a nullity, and its defects may therefore be cured by amendment. *Dobry v. Western Mfg. Co.*, 57 Neb. 228.

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have assigned, removed, and disposed of, and they are about to dispose of, their property, or a part thereof, with intent to defraud their creditors.

S. W. C.

Subscribed, etc.⁶

910. AFFIDAVIT FOR ATTACHMENT WHERE DEBT IS NOT DUE.

D. A. H., the authorized attorney of the plaintiff, being first duly sworn on his oath, says that the said T. M. & Co., plaintiffs, have commenced an action in the above named court against the said A. G. B., defendant, to recover of the said defendant the sum of dollars, due and payable to the said plaintiffs from the said defendant as hereinafter stated, on book account for goods sold and delivered.

That said plaintiff's claim is just; that affiant believes the said plaintiff ought to recover of and from the said defendant the sum of dollars; and affiant further saith that the said defendant has sold, conveyed, and disposed of his property with the fraudulent intent to defraud his creditors.

That said account will mature and be due and payable from defendant on the day of, 19..; and further, affiant saith not.

D. A. H.

Subscribed in my presence and sworn to, etc.⁷

911. MOTION TO DISSOLVE AN ATTACHMENT.

Now comes the defendants in said above entitled action, by E., W., & D., their attorneys, and move the court to dissolve the attachment issued in said above entitled cause, and to discharge the property attached therein, under said writ of attachment, and for grounds of said motion, say:

1. That no bond for costs or security therefor, or poverty affidavit, was filed in said court, at the commencement of said action, as provided by law.

⁶ Adapted from form in *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520.

⁷ Form in *Reed Jones & Co. v. Bagley*, 24 Neb. 332.

ATTACHMENT.

2. That the plaintiff in said action is, and was at the commencement thereof, non-resident of the State of Oklahoma.

3. That said claim sued on in said action, was not, at the commencement of said action, and is not now, and never has been, just, due and unpaid, but is founded wholly upon tort.

4. That said defendants were not, at the filing of said affidavit for attachment, nor at any time since, and are not now non-residents of the State of Oklahoma, but have, at all times since, and for a number of days prior to the filing of the affidavit for attachment, and are now, residents of the county of in the State of Oklahoma.

5. That the defendants were not, at the issuance of said writ of attachment and the filing of the affidavit therefor, and at no time have they, or either of them, been, or are they now, about to convert their property, or any part thereof, into money for the purpose of placing it beyond the reach of their creditors.

6. That at no time, prior to the issuance of said writ of attachment nor since, nor have they now, any property which they conceal.

7. That at no time, prior to the issuance of said writ of attachment, at said time, nor since, nor have they now, any rights in action which they conceal.

8. That at the time of filing said affidavit for attachment, and no time prior thereto, nor at any time since, have they been, nor are they now, about to assign, remove and dispose of any part of their property with intent to hinder, delay and defraud their creditors or any of them.

9. That at no time prior to the issuance of said writ of attachment, nor at any time since, have they assigned, removed and disposed of any part of their property with intent to hinder, delay and defraud their creditors or any of them.

10. That all of the grounds set forth in the affidavit for attachment are, and were at the time of the making and filing thereof, false and wholly untrue.

Wherefore, said defendants move the court to dissolve the

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attachment levied in said above entitled action, and to discharge the property in said action attached, from the lien and levy of attachment, and that they have their costs in this behalf, and such other and further relief as may seem to the court just and equitable.⁸

912. SAME—ANOTHER FORM.

Now comes the defendant in the above entitled cause and moves the court to dissolve the attachment issued in said cause and to discharge the property attached therein under said writ of attachment and for grounds of said motion says:

That the grounds alleged in plaintiff's affidavit are each and every one untrue.

Wherefore defendant moves the court to dissolve the attachment in said cause and to discharge the property from the lien and levy of attachment and for his costs in this behalf and such other and further relief as may seem to the court just and equitable.⁹

913. MOTION TO DISCHARGE CLAIMING PROPERTY AS EX-EMPT.

Now comes the defendant and moves the court to discharge the attachment in the above entitled cause, and discharge the property from attachment and seizure for the reason that:

The defendant is the head of a family and is entitled under the statute to a homestead, in the property which has been attached and seized in this case.¹⁰

⁸ Form in *Carnahan v. Gustine*, 2 Okla. 399.

⁹ Adapted from facts in case of *Becker v. Langford*, 39 Kan. 35.

On motion to dissolve the burden of proof is on the plaintiff. *Becker v. Langford*, 39 Kan. 35; *McPike v. Atwell*, 34 Kan. 142; *Dunn v. Claunch*, 13 Okla. 577; *Mitchell v. Carney*, 41 Kan. 139.

¹⁰ Adapted from facts in *Cassady v. Morris*, 19 Okla. 204.

A motion to discharge an attachment must succeed or fail upon the truth or falsity of the attachment affidavit. *Carnahan v. Gustine*, 2 Okla. 399.

A motion to discharge an attachment, which contains an explicit denial of the allegations in plaintiff's affidavit for attachment, is sufficient to raise an issue as to the truth of the grounds laid for attach-

ATTACHMENT.

914. AFFIDAVIT FOR SERVICE BY PUBLICATION.

State of
County of } ss.

J. C. G., the plaintiff herein, being duly sworn, says: That A. C. B., the defendant in the above entitled action, resides out of the state of, and is a non-resident thereof; further says, service of a summons cannot be made on him within the State of, and that defendant has property within this state sought to be taken by attachment in this action, a provisional remedy.^{10a}

ment, and a verification of the motion or of the allegations of denial is not essential. *Kendall Boot and Shoe Co. v. August*, 51 Kan. 53.

The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or part of the property attached; and the fact that the defendant has executed chattel mortgages upon the attached property does not bar or estop him from filing his motion to discharge. *Smith-Frazer Boot and Shoe Co. v. Derse*, 41 Kan. 150.

The failure of the plaintiff to attach a copy of the instrument on which the action is brought to the petition is not a good ground for dissolving an attachment. Such omission can be taken advantage of only by a proper motion, directed against the petition itself, to require a copy to be given. *Olmstead v. Rivers*, 9 Neb. 234.

In an action accompanied by attachment proceedings the filing by the defendant of a motion to dissolve the attachment does not excuse him from pleading to the petition. Although such motion be pending, if he fail to plead to the petition within the time provided by law, his default may be entered and the plaintiff proceed to judgment. *Stutzner v. Printz*, 43 Neb. 306.

The lapse of time between the making of affidavit and filing of action is not of itself a ground for discharge of attachment. *Adams v. Lockwood, Englehart*, 30 Kan. 373.

^{10a} Form in *Bogle v. Gordon*, 39 Kan. 31, 32. This affidavit was held to be sufficient and that it is not necessary to state that a cause of action exists against the defendant. It is sufficient to state the parties are non-residents of the state at the time the affidavit for publication was made.

In order to support service by publication against a non-resident defendant in attachment proceeding, the affidavit for such service should show that the defendant has property within this state subject to attachment. *Trust Co. v. Norris*, 8 Kan. App. 699.

Publication notice as to non-resident must describe the land attached and state the nature of the judgment which will be taken. *Ballew v. Young*, 24 Okla. 182.

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915. BOND IN ATTACHMENT.

The State of Nebraska, ... county, ss.

Whereas, the J. I. C. T. M. Co., a corporation, has commenced a civil action against J. W. B. and L. B. in the district court of the judicial district of Nebraska, held within and for the county of, to recover of the said J. W. B. and L. B. the sum of dollars, and whereas the said J. I. C. T. M. Co. has applied to the clerk of said court, by filing the necessary affidavit, for an order of attachment, to be issued in the said action against the said J. W. B. and L. B.

Now, therefore, we, H. W. M. and H. M. S., hereby undertake to the said J. W. B. and L. B. in the penal sum of dollars that the said J. I. C. T. M. Co. shall pay to the said J. W. B. and L. B. all damages which the said J. W. B. and L. B. may sustain by reason of said attachment, if the order should have been wrongfully obtained.

Dated this day of, 19...¹¹

916. ATTACHMENT BOND—OKLAHOMA.

Whereas, the plaintiff has commenced a civil action against the defendant in the court of the county to recover of the defendant the sum of dollars; and whereas the plaintiff has applied to the clerk of said court by filing the necessary affidavit for order of attachment to be issued in said action against the defendant.

Now, therefore, we, ... and, hereby undertake to the said in the penal sum of dollars, that the said plaintiff shall pay to the said defendant all damages which the said defendant may sustain by reason of said attachment, including attorney's fees, if the order be wrongfully obtained.

Dated this day of, 19...¹²

¹¹ Form in record in *Bauer v. Mitchell*, 80 Neb. 187.

¹² Adapted from form in *Wells v. McCrady*, 24 Okla. 295.

It seems that since the amendment of the statute in Oklahoma the

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917. FORTHCOMING BOND IN ATTACHMENT.

Whereas, ..., the sheriff of G. county, ..., did on the day of, 19.., on an order of attachment issued out of the district court of G. county, ..., attach certain goods and chattels in the hands of J. & M., in a case pending in said district court wherein D. & S. are plaintiff and J. & M. are defendants, which property is appraised at the sum of dollars, and which property is now delivered to J. & M. at their request.

Now, we, J. & M. as principals and D. F. and P. H. M. as sureties, do hereby undertake to the plaintiff in the sum of dollars, that said property, to-wit: (describe property) now in the store of J. & M. in G. county, ..., or its appraised value in money, shall be forthcoming to answer to the judgment of the court in this action.¹³

bond should provide that plaintiffs will pay all damages "including attorney's fees." *Wells v. McCrady*, 24 Okla. 295.

A defective attachment bond may be amended, where the request is made by the plaintiff. *Wells v. McCrady*, 24 Okla. 295.

¹³ Form in *Dewey v. Kavanaugh*, 45 Neb. 233.

Forthcoming bond may be given and property retained by the defendant. *Comp. Laws Okla.* 1909, sec. 5710; *Cob. Ann. Stat. Neb.* 1911, sec. 1179; *Gen. Stat. Kan.* 1909, sec. 5793.

Attachment is not discharged by the execution of a forthcoming bond. *Tyler v. Safford*, 24 Kan. (581) 413; *Whiteley v. Davis*, 20 Neb. 504; *Hilton v. Ross*, 9 Neb. 406.

Forthcoming bond will be held good as a common law bond, though it does not conform to the statute, if it does not contravene public policy or violate the law. *Blanchard v. Anderson*, 27 Okla. 732; *Woodward v. Bingham*, 25 Okla. 400.

Where real estate is attached, the holder of a mortgage thereon may interplead in the action. *Bodwell v. Heaton*, 40 Kan. 36.

An equitable interest in land is subject to attachment. *Shanks v. Simon*, 57 Kan. 385.

A foreign administrator with the will annexed may sue out an order of attachment in the State of Kansas. *Dunlap v. McFarland*, 25 Kan. 339.

In an action commenced by attachment on a claim before due, it is not necessary to set forth in the petition the grounds upon which the attachment is obtained. *Pierce v. Myers*, 28 Kan. 259.

A justice of the peace is not authorized to issue an attachment upon a claim before due. *Lyons v. Insley, Shire & Co.*, 32 Kan. 174.

918. BOND TO DISCHARGE ATTACHMENT.

(Venue and title.)

Know all men by these presents, that we, the undersigned, are held and firmly bound unto J. D. G., the plaintiff in the above entitled action, in the penal sum of dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

The condition of the above obligation is such that whereas, the above named plaintiff, J. D. G., did on the day of, 19.., begin the above entitled action against the above named defendant, C. L. M., to recover the sum of dollars, and caused an attachment to be issued and levied upon the property of said defendants, and this bond is given for the purpose of having said attachment discharged.

Now, therefore, if the said defendants shall perform the judgment of the court in the above entitled action, and shall well and truly pay the amount of any judgment that shall be rendered against them in said action, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands this day of, 19...¹⁴

The owner of property which has been stolen or embezzled may waive the tort and sue on the implied contract, and in such action he may have an attachment against the non-resident defendant. *Lipscomb v. Citizen Bank*, 66 Kan. 243.

Attachment, though sometimes called an ancillary or auxiliary proceeding, is nevertheless, in all essential respects, a suit. The affidavit of a plaintiff made to obtain the writ of attachment, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff, constitute the pleadings in the proceeding. *Jordan v. Dewey*, 40 Neb. 639.

Correction of name of party plaintiff by amendment does not vitiate the levy of attachment. *Henderson v. Stetter*, 31 Kan. 56.

¹⁴ Form in *Moffitt v. Garrett*, 23 Okla. 398.

The obligor under a bond given to discharge attachment is liable regardless of whether attachment was wrongfully issued. *Moffitt v. Garrett*, 23 Okla. 398.

CHAPTER CIV.

ELECTION CONTESTS.

- 919. Action to contest the election of the defendant to the office of county attorney.
- 920. Petition contesting the election to the office of county treasurer.
- 921. Answer to petition in contest for office of county attorney.
- 922. Answer to petition contesting election to office of county treasurer.
- 923. Answer of contestee to petition of contestant.
- 924. Answer and cross petition of contestee.
- 925. Notice of contestant to contestee of presentation and filing of petition or notice of contest.
- 926. Another form of contestant's notice of contest.
- 927. Motion to dismiss for want of jurisdiction.
- 928. Return of service of notice of contestee by private person.

919. ACTION TO CONTEST THE ELECTION OF THE DEFENDANT TO THE OFFICE OF COUNTY ATTORNEY.

Comes now W. F. R., plaintiff, and alleges:

That he is a duly qualified elector of the county of M., in the State of Oklahoma, and was, on the day of, 19.., a qualified voter and resident of the territory now embraced in and constituting the county of M., in the State of Oklahoma.

That on the day of, 19.., an election of and for the proposed county of M., in the proposed State of Oklahoma, for county and other officers, as provided by law, was held in said proposed county of M., under a call duly made pursuant to the provisions of an ordinance duly passed for that purpose, and as provided by law by the convention duly authorized by act of Congress to formulate a constitution for the proposed State of Oklahoma and to provide for an election to ratify the same and for the election of all elective state, county and township officers created by said proposed constitution.

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That at said election the plaintiff, W. F. R., was a candidate for the office of county attorney of said proposed county of M., duly nominated by the Republican party as such candidate, and whose name appeared as such candidate upon the official ballots of said election in said proposed county of M.

That at said election the defendant, W. J. C., was also a candidate for said office of county attorney of said proposed county of M., duly nominated by the Democratic party as such candidate, and whose name appeared as such candidate upon the official ballots of said election in said proposed county of M.

That for the purpose of said election said proposed county of M. was divided into thirty election precincts and that an election was held in each of said precincts and that votes were cast, counted and canvassed and the canvass thereof recorded and the return thereof made as required by law by the respective election officers in each precinct for said plaintiff and said defendant for said office of county attorney.

That the total number of votes cast in all of said precincts in said proposed county of M. for said office of county attorney was; that of said votes, ... votes were cast and counted by the boards of election in the respective precincts for the plaintiff, W. F. R., for said office of county attorney; votes, and no more, were cast and counted for W. J. C., the defendant, for said office of county attorney; that the said W. F. R., plaintiff, received a majority of all of the votes cast at said election for said office of county attorney and was thereby duly and legally elected to said office.

That notwithstanding said election, J. E. W. and W. H. N., a majority of the board of county commissioners of the proposed county of M., and P. S., the then county clerk of said proposed county of M., which said board of county commissioners, together with said county clerk, were charged under the law with the duty of canvassing the returns of said election and determining and declaring the result thereof, did,

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in the discharge of such duty, willfully and without authority of law, reject the returns of said election for said office of county attorney from certain of the voting precincts of said proposed county of M., to-wit:

(Set out precincts by number and township), and refused and failed without cause to canvass the election returns from said mentioned precincts and to count and tabulate the votes for said office of county attorney as shown thereby, and to include the same in the abstract of the votes cast at said election for said office as required by law; that I. B., the remaining member of the board of county commissioners of said proposed county, did canvass all the returns of said election including the three precincts aforementioned so rejected by the majority of said board, and did prepare and certify a complete, true and accurate statement of the votes as shown by said returns and as alleged in this petition for said office of county attorney, and that said J. E. W. and said W. H. N. willfully, and without cause refused to sign and certify the same, but on the contrary prepared and certified to an abstract of the votes cast at said election in twenty-seven of said precincts, to-wit, in each of said precincts excepting the three precincts heretofore described for said office of county attorney and for the plaintiff and defendant together with all other candidates for office in said proposed county of M. at said election, which said abstract is now on file with the county clerk of M. county, and which said abstract is a true and correct statement of the votes cast at said election for the plaintiff and defendant for said office in all of the election precincts of said proposed county excepting the three precincts hereinbefore mentioned, and in which said three precincts the plaintiff received votes and the defendant votes, and which said votes were not canvassed nor counted by said board nor included in the abstract so made and prepared by them as aforesaid as it was their duty so to do; that said W., N. and S. did falsely and erroneously determine and declare that the defendant had received votes and that the plaintiff had received only votes at said

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election and was elected to said office, whereas in truth and in fact the plaintiff received votes and the defendant received only votes and less than a majority of all the votes cast at said election, and that the votes cast for the plaintiff and defendant, respectively in said rejected precincts, the election returns from which were not canvassed, were enough if counted to have changed and to change the declared result of said election so erroneously and falsely made as aforesaid; that the defendant's election certificate is illegal, and was unlawfully issued to him as a result of said fraudulent, false and erroneous canvass.

That, notwithstanding the plaintiff's lawful election to said office of county attorney as aforesaid, the defendant, W. J. C., usurped and intruded into the office of county attorney of M. county in said State of Oklahoma and has ever since unlawfully exercised the same and excluded the plaintiff therefrom and withheld and still withholds the same and the fees and emoluments thereof from him, the said plaintiff.

Wherefore the plaintiff, W. F. R., demands judgment that the defendant, W. J. C., was not elected and that he be declared not elected to said office of county attorney, and that he, the plaintiff, was duly elected and that he be declared duly elected to said office of county attorney; that the votes so cast at said election for said office of county attorney be recounted under the direction of this court, in order that the true facts, as herein alleged by the plaintiff and the result of said election may be ascertained and determined; that the title to said office of county attorney, as between plaintiff and defendant, be judicially determined and declared; that the said W. J. C. be declared not entitled to said office of county attorney and that he be adjudged guilty of unlawfully entering, usurping and intruding into and unlawfully holding said office, and that he be excluded from the same and the privileges and franchises thereof; that the plaintiff be declared entitled to have and to hold and exercise said office, by virtue of his said election, and that he recover the costs of this action.¹

¹ From form in record in Rampendahl v. Crump, 24 Okla. 873.

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920. PETITION CONTESTING THE ELECTION TO THE OFFICE OF COUNTY TREASURER.

1. And now comes P. F. D., for himself and all others similarly interested, contestant in the above entitled cause, a resident elector and taxpayer of S. county, Nebraska, competent to contest the election of C. E. B. to the office of treasurer of S. county, Nebraska, and who has been a resident elector and taxpayer in said county for sixteen years, and brings this action for the purpose of contesting the election of C. E. B., to the office of county treasurer of S. county, Nebraska.

2. And your contestant shows to the court that one J. H. D. was elected to the office of treasurer of S. county, Nebraska, at the general election held in in the year 19.., for years, commencing in, 19..; that he filed his bond and took his office and held the same until the day of, 19.., when he resigned from said office.

3. Your contestant further shows to the court that C. E. B. was duly appointed treasurer of S. county, Nebraska, on the day of, 19.., to fill out the unexpired term of J. H. D. who had resigned, and whose term would expire on the day of, 19..

4. And your contestant further shows to the court that at the general election held in, to-wit: on, 19.., C. E. B. was a candidate for the office of treasurer of S. county, Nebraska, and was duly elected to said office at the said election; that he filed his bond and took the office of treasurer of said county in, 19.., under and by virtue of said election, and has held the same ever since, and is now holding said office, it being his second term in said office up to, 19..

5. And your contestant further shows to the court that C. E. B. was a candidate for the office of treasurer of S. county, Nebraska, upon the fusion ticket, to-wit: the democratic and populist ticket at the general election held in, to-wit: on the day of, 19.., for the term of office commencing in, 19.., for years,

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and that one G. W. C. was a candidate upon the republican ticket at the said election, and that both were voted for at said election, to-wit: on, 19.., and that upon the face of the returns, the said C. E. B. received an apparent majority of votes at said election, and that by the canvassing board, duly selected to canvass the returns of said election, he was duly declared elected and a certificate of election was issued to him, and that unless said election of said B. is contested and he be declared ineligible to said office he will take his seat as county treasurer of S. county, Nebraska. The said B. threatens and declares that he will take his seat as said treasurer, and hold said office for the term commencing in, 19.., and will do so unless he is declared to be ineligible to said office.

6, And your contestant shows to the court that the said C. E. B. is ineligible to hold said office of treasurer of S. county, Nebraska, for the year 19.. and 19.., for the reason that he has held said office for two consecutive terms, his first term being from, 19.., to, 19.., under an appointment from the county commissioners of S. county, Nebraska, and the second term being during the years 19.. and 19.., under the election held in, 19.., at which time he was elected to said office, and therefore he is ineligible to hold said office of county treasurer of said county for the years 19.. and 19...

Wherefore your contestant prays that this court will declare that the said C. E. B. was and is ineligible to the office of county treasurer of S. county, Nebraska, for the years 19.., 19.., that being his third term, and that the election of the said C. E. B. be declared void, and for such other and further relief as in equity and good conscience he is entitled to receive and that he may recover his costs herein expended.²

² From form in record *Dodson v. Bowlby*, 78 Neb. 190.

Statutory provisions. Cob. Ann. Stat. Neb. 1911, sec. 5715 *et seq.*; Gen. Stat. Kan. 1909, sec. 3195 *et seq.*; Comp. Law Okla. 1909, sec. 4808.

A petition in an action to contest an election which alleges generally that the judges and clerks of election permitted a certain number of illegal votes to be cast in favor of a certain town for county seat, and that without such illegal votes the plaintiff's candidate would

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921. ANSWER TO PETITION IN CONTEST FOR OFFICE OF COUNTY ATTORNEY.

Comes the defendant, W. J. C., and for his answer to the petition of the plaintiff, admits that for the purpose of the have been elected, and setting out the number of votes which the petitioner claims each candidate legally received and which, if correct, would give to the petitioners' candidate a majority of all the legal votes cast, is not sufficient to state a cause of action. The pleader must set out the facts from which the court can say as a matter of law that the votes were illegal, and that without such illegal votes the result of the election would have been in favor of plaintiffs' candidate. *Robertson and Blair v. Co. Comm'rs of Grant Co.*, 14 Okla. 407.

In a contest of the office of county treasurer it is necessary to allege and prove that the contestant is an elector of the county in and for which the contestee is declared elected. *Dodson v. Bowlby*, 78 Neb. 190.

On an appeal from the decision of a county court in a contested election, it is not requisite to file new pleadings in the district court. *Griffith v. Bonawitz*, 73 Neb. 622.

The inquiry in a court for the trial of a contested election is not necessarily limited to the matters presented in the contestor's statement. The contestee may be heard, not merely in denial, but in proof of other matters tending to show his right to the office, notwithstanding the matters alleged in the statement; and these other matters the contestor may also controvert, or avoid. *Baker v. Long*, 17 Kan. 321.

In contesting an election in court the allegations of the petition and proof must correspond; in other words, the plaintiff must set forth in his petition the names of the persons whose votes are claimed to be illegal, in order that issue may be taken thereon. If such names are unknown at the time of bringing the action, the contestant afterward should obtain leave of court to amend his petition, giving a list of the names of voters claimed to be illegal, and it is the duty of the court to designate from the evidence the particular persons who have voted unlawfully. *Todd v. Cass County*, 30 Neb. 823.

An objection by the contestee to the counting of papers offered by the contestor as the ballots from an election precinct, on the ground that they have not been preserved as required by law and are not brought into court in the same condition as that in which they were left by the election board, is an objection to evidence only, is not the statement of a defense to the causes of contest set forth in the contestor's statement, and the grounds of the objection need not be pleaded in the contestee's answer. *Moorhead v. Arnold*, 73 Kan. 132.

Form of complaint by contestant in the contest of an election for township organization. *Albert v. Twohig*, 35 Neb. 503.

Form of petition in a contest of a bond election for the purpose of voting bonds to erect a courthouse. *Todd v. Cass Co.*, 30 Neb. 823.

Form of allegations of the contestor in contesting an election for the office of county treasurer. *Lawrence v. Wheeler*, 77 Kan. 209.

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election mentioned in said petition, said county of M. was divided into thirty election precincts, and admits that an election was held in each of said precincts on the day of, 19.., as alleged in said petition, except in (set out number of precincts and townships), and admits that the votes were cast, counted, canvassed and the canvass recorded, and the returns thereof made as required by law by the respective election officers in each of said precincts, except the three last above mentioned.

He denies that the total number of votes in all of the precincts for said office of county attorney was, and denies that votes were cast and counted by the boards of election in the respective precincts for the plaintiff, for the office of county attorney, and denies that votes were cast and counted for this defendant, and he denies that the plaintiff received a majority of all the votes cast at said election for the office of county attorney, and denies that plaintiff was duly or legally elected to said office. He denies that the board of county commissioners and the clerk of said county did willfully or without authority of law, reject the returns from the said three precincts hereinbefore mentioned, and he denies that said board refused or failed without cause to canvass the election returns from said three precincts, or to count and tabulate said votes, and to include the same in the abstract of votes cast at said election for said office.

He denies that on the day of, 19.., an election was held and the votes were cast as the law required in said three precincts, and he denies that the votes were counted or canvassed and the canvass thereof recorded, and the returns thereof made as required by law, by the respective election officers in said three precincts. He denies that the said I. B. did canvass the alleged votes from the said three precincts, and denies that he did prepare and certify a complete, true and accurate statement of the votes as shown by said returns, and he denies that the said J. E. W. and W. H. N. willfully, or without cause, refused to sign and certify the same.

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He admits that said board prepared and certified to an abstract of votes cast at said election in all of the voting precincts in said county, except the three precincts above mentioned, and admits that said abstract is a true and correct statement of the votes cast at said election, and he admits that said board did not prepare and certify to an abstract of votes from said three precincts, and he denies that in said three precincts the plaintiff received votes and the defendant, and he denies that it was the duty of said board to canvass said alleged votes from said precincts.

He denies that the said W., N. and S. did falsely or erroneously determine and declare that the defendant had received votes, and that the plaintiff had received only votes at said election, and that said defendant was elected to said office, and he denies that plaintiff received votes, or that the defendant received votes, and he denies that the defendant received less than a majority of all the votes cast at said election, and he denies that the alleged votes cast at said three election precincts, if counted, would have been enough to change the declared result, and denies that the declared result made by said board was erroneously or falsely made. He denies that his election certificate is illegal, or that it was unlawfully issued to him as the result of a fraudulent, false or erroneous canvass.

He denies that plaintiff was elected to said office, and denies that he usurped or intruded himself into said office, and denies that he has unlawfully exercised the duties of the same.

He admits that he holds said office, and withholds the same, the fees and emoluments thereof from the said plaintiff, for the good and sufficient reason that said plaintiff has no right, title or interest in said office, and is seeking the same without having been elected thereto.

Wherefore, defendant prays that the plaintiff take nothing by this suit; that he have judgment for cost, and for all legal and proper relief.³

³ From form in record in Rampendahl v. Crump, 24 Okla. 873.

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922. ANSWER TO PETITION CONTESTING ELECTION TO OFFICE OF COUNTY TREASURER.

1. Comes now C. E. B., respondent herein, and protesting that the petition herein filed is not sufficient in law, so that he is not bound to answer thereunto, yet for plea and answer thereto denies each and every allegation in said petition contained except such as are hereinafter expressly admitted or denied.

2. Further answering said petition, respondent alleges that there is no valid statute or law of the State of Nebraska, making a county treasurer or any other county officer ineligible to hold office by reason of having previously held the same office, and particularly charges that section numbered (set out act and laws), is unconstitutional, inoperative, void, and of no effect, for the reason that the subject of said section is not clearly expressed in the title of said act; and for the reason that said act relates to more than one subject, in this, that section numbered ten relates to a subject other than the subject of the remaining portions of said act.

3. Further answering said petition and particularly paragraph 2 of said petition, respondent says that he has no information upon which to base an admission or denial of the matters therein set forth, and asks that strict proof be required of the contestant as to such matter.

4. Further answering said petition and particularly paragraph 3, thereof, respondent admits that he was appointed treasurer of S. county, Nebraska, on the day of, 19.., to fill out the unexpired term of J. H. D., who had resigned from said office and admits that the term of said J. H. D. did expire on or about, 19...

5. Further answering said petition and particularly paragraph 4 thereof, respondent admits that he was on the day of, 19.., elected to the office of county treasurer of S. county, Nebraska; admits that he filed his bond and took said office in, 19.., under and by virtue of said election; admits that he held said office under said election for the full term thereof; and says that he is

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now holding said office under and by virtue of the election held in, 19... But denies specifically that the time served under said appointment constitutes a term, within the meaning of the laws of the State of Nebraska; and denies specifically that the said term from, 19.., constituted his second term in said office, but alleges the fact to be that said term was the first term in said office.

6. Further answering said petition and particularly paragraph 5 thereof, respondent admits that he was a candidate for the office of treasurer of S. county, Nebraska, on the fusion ticket at the general election held in, 19.., and that G. W. C. was a candidate for said office at said election and admits that respondent received a majority of votes at said election for said office, and admits that he was by the canvassing board duly declared elected to said office for the term beginning the after the in, 19.., and that a certificate of election has been duly issued to this respondent by the proper officer. And respondent further says that he is now holding said office of county treasurer of S. county, Nebraska, under and by virtue of said election and said certificate of election.

Respondent further answering said paragraph 5 of said petition, avers that he is eligible to hold said office of county treasurer of S. county, Nebraska, for the term beginning the after the in, 19...

7. Respondent further answering said petition and particularly the 6th paragraph thereof, denies specifically that he is ineligible to hold said office of county treasurer of S. county, Nebraska, for the term beginning the after the in, 19.., for any reason whatsoever; denies that he has held said office for two consecutive terms but avers the fact to be that he has served but one term in said office; denies specifically that the period from, 19.., to, 19.., under an appointment to fill out the unexpired term of J. H. D., constitutes a term within the meaning of the laws of Nebraska, but alleges the fact to be that the word "term" as used in section numbered ten of Chapter twenty-six of the Compiled Statutes intends and

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means elective term or terms by election only, and has no reference to any period of time served in said office of county treasurer by virtue of an appointment.

Respondent alleges the fact to be that he was at the, 19.., general election duly elected to the office of county treasurer of S. county, Nebraska, for the term beginning the after the in, 19.., and that he was at the time of said election eligible to be elected to said office, and to hold the same, and that he is eligible to hold said office for said term under said election.

Wherefore, respondent prays that he may be declared and adjudged to be eligible to hold said office of county treasurer of S. county, Nebraska, for the term beginning the after the in, 19..; that he may be declared and adjudged entitled to hold said office for said term as the duly elected and qualified county treasurer of said county; and that election may be confirmed, and for such other and further orders as may be just, and that he recover his costs herein expended.⁴

923. ANSWER OF CONTESTEE TO PETITION OF CONTESTANT.

Contestee answering says: That he denies that any illegal votes were cast at the precincts mentioned in said statement, and alleges that each of the persons therein named as casting votes illegally at said election were on the day of said election duly qualified electors of D. township, L. county, Kansas, and had at the time all the qualifications of electors at the precincts where they voted.

Further says, as an additional reason why he should be elected to the office of county treasurer of L. county and permitted to retain his certificate of election:

That at said election in this county there were more than illegal defective and void ballots containing X marks at a place other than after the names of candidates voted for, thus constituting a distinguishing mark and rendering the ballots defective and void, all of which should have been thrown out and not counted for any one for any office, but

⁴ From form in record, *Dodson v. Bowlby*, 78 Neb. 190.

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all of which were counted for said candidate the contestor.

That if the said void, illegal and defective ballots had not been counted for said contestor, this contestee would have had more than majority of the votes cast at said election without counting any of the votes cast by the persons mentioned in the contestor's statement of contest.

That said defective, illegal and void ballots are more particularly described as follows:

The second column of the official ballot contained the names of the nominees of the democratic party for the various county offices, among which was the name of the contestor for the office of county treasurer. That the democratic party made no nomination for the office of clerk of the district court, and that in said column after the title of said last mentioned office were printed the words, "No Nomination."

That to the right of said words was a square similar to the square to the right of names of candidates on said ballot.

That all of the more than defective, illegal and void ballots above referred to had X marks in the squares immediately to the right of the words "No Nomination" in the second column of said ballot under the title "For clerk of the district court." That all said X marks were placed on said ballots by the persons who voted said ballots.

1. That in the 1st precinct of the First Ward of the city of Leavenworth there were of such void ballots cast and counted for contestor.

2. (Here follows list of precincts and number of void ballots cast.)

This contestee therefore alleges that at each of the precincts in said county of L. at said election there were many ballots cast that had many and divers distinguishing marks other and different from that alleged above, which rendered said ballots void. That many of said void and illegal ballots were wrongfully counted by the judges and clerks for the contestor.

This contestee therefore alleges that upon a legal and fair count of the ballots cast at said election, he will be shown

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to have received a large majority of the votes cast for the office of county treasurer.

This contestee therefore prays that at this contest a recount be had of the ballots cast at said election in every precinct of the county and that upon such recount he be declared to have been legally and duly elected to the office of county treasurer and that contestor be adjudged to pay the costs of this contest.⁵

924. ANSWER AND CROSS PETITION OF CONTESTEE.

Comes now the contestee and says: That at the general election held at the various precincts in said second commissioner district, 19.., the parties hereto were opposing candidates for the office of county commissioner, but he denies each and every other matter and thing therein contained.

For a further answer and second defense herein, and by way of cross petition and a counterclaim and for affirmative relief in favor of this contestee, he avers that at the time of said election he was an elector of said L. county, and that at the said election he received a majority of all the votes cast for said office and had duly received certificate of election as such duly elected officer.

This contestee further says that he has been informed and believes that in each and every precinct named in said statement of election contest, good and lawful ballots cast in his favor for said office were erroneously thrown out and omitted to be counted and returned, and that errors were committed in the counting and tallying of ballots to the prejudice of this contestee; and that certain ballots were counted for said contestor which were duly cast for and should have been counted for said contestee; and that divers other errors were committed to the prejudice of this contestee; but he avers that he cannot state the numbers of said errors occurring at any one of said election precincts, nor state the same more specifically.

The premises considered, the said contestee prays that if

⁵ From form in record in *Corey v. Spencer*, 67 Kan. 648.

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the said ballots be recounted, and the several claims of the contestor be entertained and considered, then this court give suitable and full consideration of all the facts herein set forth and all circumstances inhering in said election, and grant to this contestee the benefit of all errors committed to his prejudice, and he prays for all other further and appropriate relief, and for costs.^o

925. NOTICE OF CONTESTANT TO CONTESTEE OF PRESENTATION AND FILING OF PETITION OR NOTICE OF CONTEST.

To (Contestee).

You are hereby notified that, you and I having been opposing candidates for the office of of the and State of, at the election held by the voters of said on the day of, 19.., and you having been duly declared elected to said office by the official count made by the Board of Election Commissioners on the day of, 19.., and having received a certificate of election, I shall contest your election to said office on the grounds and points set forth in the petition, a copy of which is attached to and will be served upon you in connection with this notice; and you are further notified that said petition

^o From form in record, *Moorhead v. Arnold*, 73 Kan. 132.

In a proceeding in the district court to contest an election held for the purpose of locating a county seat, it is competent for the contestee or any other party to the action to plead by way of answer any facts which would show a want of jurisdiction on the part of the county commissioners to call said election. *Laws v. Vincent*, 16 Neb. 208.

A defendant who, in an action brought against him to determine the right to the office of councilman of a city of the second class, answers alleging fraud in the election, and prays for affirmative relief, must aver that he is qualified to hold the office. *Watt v. Jones*, 60 Kan. 201.

A contestee who holds a certificate to the office, regularly issued to him by the canvassing board, and who asks no affirmative relief, his answer going only to defeat the allegations made by the contestor, is not required by section 2659, General Statutes of 1901, to plead that he is an elector of the county. *Cory v. Spencer*, 67 Kan. 648.

Pleadings in the nature of an answer and reply, are proper in the trial of a contested election, and when filed should be construed according to the ordinary rules applicable to such pleadings. *Baker v. Long*, 17 Kan. 341.

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will be filed by me in the office of the clerk of the court of the of on the day of, 19.., and said petition will be presented to the court of the of at the term of said court to be begun and held in the courthouse in the of, on the day of, 19...

In witness whereof, I have hereunto set my hand this day of, 19...

.....
Contestant.⁷

926. ANOTHER FORM OF CONTESTANT'S NOTICE OF CONTEST.

(Venue and title as above.)

You are hereby notified that you and I, having been opposing candidates for the office of at the (general, special or municipal) election held by the voters of on the day of, 19.., and you having been duly declared elected by the to said office upon the face of the returns made to by the judges and clerks of said election at the official count by said on the day of, 19.., and having received a certificate of election, I shall, at the first term of the court to be held fifteen days after said official count of said votes and the service of this notice, to-wit: at the term of the court to be begun and held at the courthouse of on the, 19.., contest your election to said office.

I allege that at the time of said election and at all times hereinafter mentioned I possessed and still possess all the qualifications necessary to entitle me to hold said office, and was then, and at all times hereinafter mentioned have been, and am now, eligible to hold the same (specify briefly the legal qualifications) and I shall contest your election to said office upon the following grounds:

⁷ A notice of contest of election which states that the contestant was an elector of the district, the points of contest, the office contested, and the date at which its duties commenced, the person selected to take depositions, and the time and place of taking the same, is sufficient. *State ex rel. v. Peniston*, 11 Neb. 100.

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(Specify grounds.)

You are therefore notified that for the reasons aforesaid, I claim to have been duly and legally elected to the office of at said election, and shall file this notice with court for the purpose of contesting your right to said office.

Witness my hand this day of, 19...

.....
Contestant.

.....
Attorney for contestant.

927. MOTION TO DISMISS FOR WANT OF JURISDICTION.

(Caption.)

..... being named in the above caption as contestee specially appearing by counsel for the purpose of contesting the jurisdiction of the court to consider, hear or determine the alleged notice of contest filed with the clerk of the court on the day of, 19.., and for no other purpose now moves the court to dismiss said alleged contest notice and proceedings for the following reason, to-wit:

(Specify grounds of motion, as insufficiency of notice of contest, in that the grounds stated therein are not sufficiently alleged, or that the notice of contest was not served on contestee or filed within the time prescribed by statute, etc.)

Wherefore, the premises considered, contestee says that contestant has no contest pending in this court against contestee; that this court has no jurisdiction and cannot now acquire jurisdiction in said pretended contest and the alleged notice of contest should be dismissed.

.....
Attorney for Contestee.

928. RETURN OF SERVICE OF NOTICE OF CONTESTEE BY PRIVATE PERSON.

State of,
County of } ss.

I, ..., being duly sworn, on oath say that I am of lawful age and disinterested in the foregoing contest, and

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duly qualified to make the following affidavit: That on the
..... day of, 19.., I did deliver unto,
the contestant herein, a true copy of the foregoing notice in
behalf of and for, the contestee herein, in the
county of,.....

.....
Subscribed and sworn to before me this day of
....., 19...

My term of office expires

.....
Notary Public.

CHAPTER CV.

FORCIBLE ENTRY AND DETAINER.

- 929. Petition in action for forcible entry and detainer (Oklahoma).
- 930. Same—Another form.
- 931. Same—Another form.
- 932. Petition in forcible entry and detainer (Kansas).
- 933. Complaint in unlawful detainer (Nebraska).
- 934. Complaint in forcible entry and detainer.

929. PETITION IN ACTION FOR FORCIBLE ENTRY AND DETAINER (OKLAHOMA).

Comes now the plaintiff herein, L. H. B., and for his cause of action against the defendant herein, O. E. C., alleges and says:

That said plaintiff is entitled to the immediate possession of the following described premises, situated in G. county, State of Oklahoma, to-wit: (here describe).

That said defendant forcibly and unlawfully detains said premises from said plaintiff, and that said defendant has so unlawfully and forcibly detained said premises from said plaintiff ever since the day of, 19...

That on the day of, 19..., said plaintiff served due notice in writing upon said defendant to quit the possession of said premises and surrender the same to him within thirty days from said date.

Wherefore said plaintiff prays for restitution of said premises and for the costs of said action.

State of Oklahoma, } ss.
..... county.

....., of lawful age, being first duly sworn, deposes and says that he is the plaintiff in the above entitled cause; that he has read the foregoing bill of particulars and knows

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the contents thereof and that the matters and things therein contained are true.¹

930. SAME—ANOTHER FORM.

A. F. being duly sworn says that she is plaintiff in the above entitled action and that on the day of, 19.., the above named defendant, L. S., did peacefully enter on the premises below described and take possession of a portion thereof, and has since said date and now does, and did on the day of, 19.., unlawfully and forcibly detain the following described land and tenements situate in county, State of Oklahoma, to-wit: (here describe land), and has ever since the day of, 19.., held and still holds possession thereof by force; that on the day of, 19.., plaintiff notified said defendant as required by law to leave said premises, which he failed and neglected to do, and still fails and refuses to leave the same; that she, the said plaintiff, was then and has ever since been and now is entitled to the possession of said premises.²

931. SAME—ANOTHER FORM.

Comes now the plaintiff, I. C. C., and for his bill of particulars and complaint herein, states that he is the owner of and entitled to the immediate possession of the following described real estate, to-wit: (here describe), that the defendant unlawfully, wrongfully and forcibly detains and withholds the possession of said land and real estate, or a part thereof, from this plaintiff, and though plaintiff is and at all times herein mentioned was entitled to the immediate and peaceable possession thereof.

Plaintiff further states that on the day of, 19.., he served upon the defendant in said county, personally, a notice in writing to leave, vacate and quit the premises, and every part thereof, within three days, or an action of forcible entry and detainer would be brought to

¹ From form in record in *Cope v. Braden*, 11 Okla. 291.

² Form in *Smith v. Finger*, 15 Okla. 120.

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compel the same; that the said defendant has failed and refused to comply with said notice, but still unlawfully and wrongfully detains the possession of said premises from this plaintiff, who is entitled to the immediate possession thereof.

Wherefore plaintiff prays judgment against the said defendant for the possession of each and every part of said real estate, to-wit: (here describe property). For the costs of this action and all other proper relief.

(Verification.)³

932. PETITION IN FORCIBLE ENTRY AND DETAINER (KANSAS).

The plaintiff complains of the defendants, and for her cause of action herein says: That she is the legal and equitable owner of the following described real property in L. county, to-wit (here describe), and the dwelling house thereon; that this plaintiff has been such owner, and as such owner has been in the actual possession of the same, from the day of, 19.., up to the day of, 19..; that on said last-named day the defendants, without any right or authority whatever, and without the knowledge or consent of this plaintiff, forcibly and with force and arms broke into and entered said above-described property, except the south room of said dwelling house; and ever since have continued to and now do by violence and force hold and keep possession of the same, and by violence and force keep this plaintiff out of the possession of the same, to her damage in the sum of dollars; that more than days prior to the commencement of this action this plaintiff caused to be served upon each of defendants a written notice to quit.

Wherefore, plaintiff demands judgment against defendants, that she have restitution of said property, and that she re-

³ The complaint need not contain a statement of the particular facts relied upon to constitute the alleged forcible entry or forcible detainer, but such complaint is sufficient in this regard if it contains the language of the statute. *Greenmeyer v. Coate*, 12 Okla. 452; *Richardson v. Penny*, 6 Okla. 328; *Schlegel v. Link*, 25 Okla. 263. But see *Rice v. West*, 10 Okla. 1.

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cover of them the sum of dollars, her damages herein sustained, and for costs of suit.⁴

933. COMPLAINT IN UNLAWFUL DETAINER (NEBRASKA).

M. H., plaintiff, complains of J. C. G. and C. G., his wife, defendants, for the plaintiff is seized in fee simple of lot No., block No., in the village of P., S. county, Nebraska, according to the recorded plat thereof, and is entitled to the possession thereof. That on or about the day of, 19.., plaintiff's grantor M. A. S., then owner and from whom plaintiff purchased the premises aforesaid, leased said premises to the defendants from month to month as tenants at will; that plaintiff on or about the day of, 19.., purchased the same from her and is now the owner thereof.

On or about the day of, 19.., the plaintiff caused a notice to be duly served upon the defendants thereby terminating said lease and tenancy on the day of, 19.., which notice was in writing and signed by her according to law, yet said defendants unlawfully and forcibly hold over their term.

On the day of, 19.., the plaintiff served a notice in writing upon the defendants to leave the premises.

Wherefore plaintiff asks restitution of premises and costs of suit.⁵

934. COMPLAINT IN FORCIBLE ENTRY AND DETAINER.

Said plaintiffs allege that they are entitled to the possession of the following described real estate (here describe); that plaintiffs have been entitled to the possession of said premises for more than three weeks now past; that said defendant unlawfully and forcibly detains said premises from said plaintiffs and has so unlawfully and forcibly detained the same for more than three weeks last past; and on the day of, 19.., plaintiffs served a notice on defendant, describing said premises, to quit within three days

⁴ Form in *Peyton v. Peyton*, 34 Kan. 624.

⁵ From form in record in *Graham v. Hiesel*, 73 Neb. 433.

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after that time; that said time has elapsed and defendant still wrongfully detains said premises.

Wherefore plaintiffs pray judgment against defendant for restitution of said premises and costs of suit.*

* Form in *Hitchcock v. McKinster*, 21 Neb. 148.

The strict and technical rules of pleading are not applied to complaints in actions of forcible entry and detainer before justices of the peace. *Armour Packing Co. v. Howe*, 68 Kan. 663.

A complaint in an action of forcible entry and detainer which accurately describes the premises, and distinctly charges an unlawful and forcible detention thereof by defendant is sufficient. *Moore v. Parker*, 59 Neb. 29.

The complaint of unlawful and forcible detention, to be good under the statute, need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute. *Blachford v. Frenzer*, 44 Neb. 829.

The complaint should set forth either an unlawful or forcible entry and detention, or an unlawful and forcible detention. *Blaco v. Haller*, 9 Neb. 149.

Amendment of the complaint should be allowed where the description of the property is defective. *Schuster v. Gray*, 8 Kan. App. 222.

The complaint must be verified. Comp. Laws Okla. 1909, sec. 6433; Cob. Ann. Stat. Neb. 1911, sec. 1966; Gen. Stat. Kan. 1909, sec. 6532.

The agent of a plaintiff may verify, under oath, the complaint. *Mercer v. Ringer*, 40 Kan. 189.

Notice to vacate the premises must be served by plaintiff at least three days before commencing the action. Comp. Laws Okla. 1909, sec. 6432; Cob. Ann. Stat. Neb. 1911, sec. 1965; Gen. Stat. Kan. 1909, sec. 6531; *Stuller v. Sparks*, 51 Kan. 19; *Douglass v. Whitaker*, 32 Kan. 381; *Conway v. Gore*, 22 Kan. (216) 157.

The plaintiff must show service of the notice required in order to obtain judgment. *Smith v. Finger*, 15 Okla. 120.

Notice to terminate the tenancy as required by the statute is waived where the tenant disclaims the relation of landlord and tenant, refuses to pay rent to his landlord, and attorns to another. *Meyer v. White*, 27 Okla. 400; *Polson v. Parsons*, 23 Okla. 778; *Snyder v. Porter*, 69 Neb. 431.

If any considerable time elapse between the giving of the three days' notice to quit and the commencement of the suit such lapse of time operates as a waiver of such notice. *New v. Collins*, 21 Okla. 430.

Defective description of the land in the notice to leave will not bar a recovery where the land was correctly described in the complaint. *Peddicord v. Berk*, 74 Kan. 236.

Right of possession is the only issue that can be determined in actions of forcible entry and detainer. *Brown v. Hartshorn*, 12 Okla.

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121; *Dysart v. Enslow*, 7 Okla. 386; *McDonald v. Stiles*, 7 Okla. 327; *Kellogg v. Lewis*, 28 Kan. (535) 384.

Forcible entry and detainer is purely a proceeding at law, and does not and cannot involve the exercise of equitable jurisdiction, the right of possession being the sole question involved. *Cope v. Braden*, 11 Okla. 291; *Stone v. Blanchard*, 87 Neb. 1.

The title to real estate, where the right of possession of same is in controversy may not be put in issue. *Zahn v. Obert*, 24 Okla. 159; *Jones v. Seawell*, 13 Okla. 711.

Where the title to the property is drawn in question a justice of the peace has no jurisdiction. *Stone v. Blanchard*, 87 Neb. 1.

Where a complaint in forcible entry and detainer is filed, which is sufficient on its face, the fact that it contains the allegation that the plaintiff is the owner of the premises therein described, will be treated as descriptive of his right of possession, and not as raising the question of title. *McClung v. Penny*, 11 Okla. 474.

Answer to the complaint putting in issue the title to the premises will not convert the action of forcible entry and detainer into an action to try the question of title. *Hackney v. McKee*, 12 Okla. 401; *McQuiston v. Walton*, 12 Okla. 130; *Pettit v. Black*, 13 Neb. 142; *Lipp v. Hunt*, 25 Neb. 91.

A denial by the defendant of the plaintiff's title does not necessarily raise the question of title so as to oust a justice of the peace or county judge of jurisdiction and the court may proceed with the trial until it is clear that the question of title is involved. *Smith v. Kaiser*, 17 Neb. 184.

District courts have no original jurisdiction of cases in forcible detainer. The jurisdiction of said courts in such actions is by error proceeding only. Original jurisdiction thereof is conferred upon justices of the peace. *Armstrong v. Mayer*, 60 Neb. 423; *Blachford v. Frenzer*, 44 Neb. 829.

New pleadings are not required in the district court on appeal. *McCue v. Lee*, 16 Neb. 575; *Anderson v. Carlson*, 86 Neb. 126.

The purchaser of leased premises succeeds to the vendor's right, and can maintain the action of unlawful detainer against the tenant holding over after the expiration of his term. *Showalter v. Ryles*, 22 Okla. 329.

Defenses—General denial. In a forcible entry and detainer case all defenses may be interposed under a general denial and it is not reversible error to strike from the answer a special defense, even though the special paragraph might plead a good defense. *Oklahoma City v. Hill*, 4 Okla. 521.

The pendency of a prior action is a defense in an action of forcible entry and detainer, to the same extent as in any other action. *Bond v. White*, 24 Kan. 35.

CHAPTER CVI.

GARNISHMENT.

- 935. Affidavit for summons of garnishment under attachment proceedings.
- 936. Affidavit in garnishment.
- 937. Answer of garnishee, acknowledging liability.
- 938. Answer of garnishee.
- 939. Same—Another form.
- 940. Same—Another form.
- 941. Answer of garnishee disclosing property in his possession.
- 942. Answer of garnishee denying indebtedness to defendant.
- 943. Notice of plaintiff of issue on answer of garnishee.

935. AFFIDAVIT FOR SUMMONS OF GARNISHMENT UNDER ATTACHMENT PROCEEDINGS.

D. A. H., one of the attorneys for the plaintiff above named, being duly sworn deposes and says that he has good reason to believe and does believe that the N. N. B. has property of the defendant in its possession and under its control, to-wit: a stock of merchandise, and that said N. N. B. is within the county of, and has such property in its possession in said county.

D. A. H.

Subscribed in my presence and sworn to, etc.¹

936. AFFIDAVIT IN GARNISHMENT.

G. W. W., being duly sworn, says that he is attorney for the plaintiff in the above entitled cause, that said defendant is indebted to said plaintiff in the sum of \$., over and above all offsets; that he verily believes that the S. B. of G., a corporation, and B. C. are indebted to, or have property, real or personal in their possession or under their control, belonging to said defendant J. E. R., that said defendant has not property liable to execution sufficient to satisfy the plain-

¹ Adapted from form in *State ex rel. v. Duncan*, 37 Neb. 631, 633.

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tiff's demand; that the indebtedness or property mentioned herein, in the possession or under the control of said the S. B. of G., a corporation, and B. C., is, to the best of the knowledge and belief of this affiant, not by law exempt from seizure or sale upon execution, and that said defendant J. E. R. is a non-resident of the State of Kansas.

Subscribed and sworn to, etc.²

937. ANSWER OF GARNISHEE, ACKNOWLEDGING LIABILITY.
State of Kansas, ... county, ss:

B. C., being first duly sworn, says that on the day of, 19.., he was served with a garnishee summons in the above entitled case. Said garnishee on oath avers at the time of the service of said garnishee summons, he held and now holds the possession of personal property, effects, credits and instruments and papers relating to such, belonging to said defendant J. E. R., or in which he is interested; but as this affiant is in doubt whether he is liable as garnishee because of the same, he hereby sets forth a description of the same, and all the facts and circumstances relating thereto and the title interest or claim of said defendant in or to the same. That he holds shares of the C. L. and I. Co., that were assigned to this affiant as collateral security for a certain promissory note executed by said J. E. R. to this affiant, said note with interest being in sum of dollars; that said shares of stock are of par value of dollars. Said garnishee further on oath avers that one other person, besides said defendant garnishee, make claim to the indebtedness and property hereinbefore mentioned and disclosed, and so far as this affiant knows the same, the name and residence of such other claimant and the nature of his claim are as follows: J. A. P. claims to own said certificate of stock subject to affiant's lien by virtue of bill of sale executed to him by the said J. E. R., ...
....., 19... That the address of said P. is M., I. T., and further garnishee saith not. B. C.

Subscribed in my presence and sworn to, etc.³

² From form in record in *Cooley v. Janes*, 71 Kan. 297.

³ From form in record in *Cooley v. Janes*, 71 Kan. 297.

GARNISHMENT.

938. ANSWER OF GARNISHEE.

Comes now C. R., garnishee in the above entitled action, and being first duly sworn, makes the following statements.

1. That on the day of, 19.., the said R. N. H. commenced an action in the county court of B. county, Nebraska, against one A. J. T., for the sum of \$....., alleged to be due as rent for a portion of section in said county for the year 19...

2. That on said day the said T. appeared in said court, in said action and made oath that P. E. M. (plaintiff herein), claimed said money (alleging, however, that the sum due was only \$.....,) and prayed that he be allowed to pay said money into court and that the said P. E. M. be summoned and required to interplead in said cause.

3. On said day the said P. E. M. filed a petition in said court, in said cause, praying to be made a party defendant, which was allowed; the said parties at the same time stipulating that the said sum of \$..... was the true sum owing by said T. on said account, and further stipulating that A. S., and C. A. S., tenants who had rented other portions of said land, for said year, might pay into said court the sums due from them to abide the decision of said case.

4. On said day, said court made an order that the said T. should pay into court the said money, and be discharged from further liability on account thereof, and that the said P. E. M. should be substituted in said action as defendant, intervenor.

5. That this affiant on said date was, and now is, county judge of said B. county, Nebraska, and as such judge, in pursuance of said order of said court, he received from the said A. J. T. the sum of \$..... and afterwards according to said stipulation, he received from the said A. S. the further sum of \$.....

6. That on the day of, 19.., in said county court, said case was heard, and it was by said court adjudged that said moneys, in the sum of \$....., belonged to the said R. N. H., and it was further adjudged that the said H. recover of the said P. E. M. his costs in the sum of \$.....

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7. The said P. E. M., on the day of, 19..., filed a bond to appeal said cause to the district court of B. county, Nebraska, and perfected said appeal by filing his transcript in the said district court on the day of, 19...

8. On the day of, 19..., H. H., attorney for the said R. N. H., in said action in the said county court, filed in said court notice of an attorney's lien upon said moneys and upon said judgment in the sum of \$.

9. That this affiant has said moneys still in his possession and has no other moneys or effects in his hands or under his control that could possibly belong to the said R. N. H. than as stated above; and further alleges that said moneys are in *custodia legis*, and cannot be said to be the moneys of the said R. N. H. until the action so as aforesaid begun in said county court has been finally determined in favor of the said H.

10. That the said sum of \$. costs in said action has not been paid, nor any part thereof, and this affiant claims a lien on said moneys for the amount thereof.

And further affiant saith not.

C. R.

Subscribed and sworn to, etc.⁴

939. SAME—ANOTHER FORM.

Comes now N. N. B. and for answer of garnishee in the above entitled cause of action shows the court as follows:

That on the day of, 19..., the defendant C. P. made and executed a chattel mortgage to this garnishee on defendant's stock of merchandise in county, Nebraska, for the purpose of securing a promissory note in the sum of dollars of even date with said chattel mortgage; that said note became due on the day of 19..., and payment of the same was demanded of the defendants and refused, whereupon garnishee took into his possession the stock of goods described in said chattel mortgage and proceeded to sell the same at public sale ac-

⁴ From the record in McKillip v. Harvey, 80 Neb. 264.

GARNISHMENT.

ording to the terms and conditions of the mortgage made by defendant. That all of said goods and stock of merchandise were sold and that garnishee realized from said sale the sum of dollars; that the expenses of said sale amounted to dollars and affiant has paid the expenses of said sale and has applied upon the note held by garnishee the sum of dollars in full payment of said note and interest and there remains in the hands of the garnishee as a part of the proceeds of the said sale dollars. That affiant is holding said amount subject to the order of this court, and that he is now ready to pay the same into court and asks to be discharged under the garnishment proceedings.

N. N. B.

Subscribed and sworn to, etc.⁵

940. SAME—ANOTHER FORM.

Comes the garnishee, J. M. B., and states for his answer that he has in his possession the sum of dollars due the said defendant.

Affidavit.⁶

941. ANSWER OF GARNISHEE DISCLOSING PROPERTY IN HIS POSSESSION.

Now comes H. R., garnishee in the above entitled cause of action, and for his answer to the summons of garnishment says:

That at the time he was served with summons of garnishment he was indebted to the defendant in the sum of dollars, not then due; that said indebtedness is evidenced by a promissory note dated the day of, 19..., in the sum of dollars and due on the day of, 19...

Subscribed and sworn to, etc.⁷

⁵ Adapted from form and facts in *State ex rel. v. Duncan*, 37 Neb. 631, 633.

⁶ Adapted from form in *Brooks v. Fields*, 25 Okla. 427.

The plaintiff has the right to demand that the garnishee answer under oath, but if he does not require it, an answer without oath is sufficient. *Brooks v. Fields*, 25 Okla. 427.

⁷ Adapted from facts in *Harwi v. Klippert*, 67 Kan. 743.

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942. ANSWER OF GARNISHEE DENYING INDEBTEDNESS TO DEFENDANT.

Now comes F. N. B. and being duly sworn on his oath says:

That at the time of the service of the summons of garnishment herein this garnishee was not indebted to the defendant in any sum whatever, and did not have in its possession any goods or chattels of any kind belonging to the defendant, or in which the said defendant had any interest.

Wherefore garnishee having fully answered prays to be dismissed with its costs for answering.

.....
Subscribed and sworn to, etc.⁸

943. NOTICE OF PLAINTIFF OF ISSUE ON ANSWER OF GARNISHEE.

Notice is hereby given to J. M. B., the garnishee in the above entitled action, that the said plaintiff, N. J. F., elects to take issue on the answer of the said garnishee in said action.⁹

⁸ Adapted from facts in *Lumber Co. v. Bank*, 63 Kan. 768.

To try the truth of an answer of a garnishee, no pleadings are required other than the affidavit for garnishment, the answer of the garnishee, and the notice that the answer is unsatisfactory. *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 257.

⁹ From form in *Brooks v. Fields*, 25 Okla. 427.

The answer of a garnishee is conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice in writing that he elects to take issue on his answer. *Davis v. Lilly*, 17 Okla. 579.

Order of garnishment cannot be issued to a county under the Code of Nebr. other than that in which the principal action is brought. *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29.

In an action by a wage-earner against a person assuming to be his creditor (under sec. 1531 Cob. Ann. Stat. Neb. 1911), who has by garnishment proceedings in a foreign jurisdiction obtained wages earned within 60 days previous to the garnishment, it is necessary to allege that the wage-earner was a resident of the State of Nebraska and entitled to the wages exempt at the time of the garnishment. *Corliss v. Pano Mfg. Co.*, 80 Neb. 366.

Answer is not sufficient which alleges that the debt of the garnishee to the defendant is exempt from seizure. *Burlington & Missouri River R. R. Co. v. Thompson*, 31 Kan. 180.

GARNISHMENT.

In pleading a pending attachment or garnishment as a defense, the defendant should show whether the whole, or what portion of the debt, has been attached or garnished. *Clark v. Marbourg*, 33 Kan. 471.

It is the duty of one summoned in garnishment, holding property in the name of the defendant debtor, but having notice of the claim of a third party to the same, to disclose, by its answer, the name and post-office address of such claimant, in order that such claimant may be interpleaded and the garnishee be relieved from liability by delivery of the property to the officers of the court, as provided by statute. *Rock Island Lumber and Mfg. Co. v. Fourth Nat'l Bank*, 63 Kan. 768.

At the time of the change to statehood of Oklahoma garnishment was authorized only in suits by attachment. *Arnold v. McLellan*, 27 Okla. 598.

The fact that a debtor has mortgaged his property, which is subsequently attached, will not preclude him from moving for a discharge of the attachment or for the discharge of the garnishees. *Cox Manufacturing Co. v. August*, 51 Kan. 59.

CHAPTER CVII.

INTERPLEADER.

944. Bill of interpleader filed by insurance company—Two claimants to fund.
945. Interplea filed by one of the claimants to a fund paid into court under a bill of interpleader.

944. BILL OF INTERPLEADER FILED BY INSURANCE COMPANY—TWO CLAIMANTS TO FUND.

Plaintiff for its cause of action states that it is a corporation duly organized and existing under the laws of the State of

That M. V. K. was on or about the day of, 19.., appointed by the probate court of the county of, State of, administrator with the will annexed of one H. C. Y., deceased, and is the duly qualified and acting administrator of said estate.

That said M. V. K. was also on or about the day of, 19.., appointed by the said probate court, administrator of the estate of one, F. L. Y., deceased, and is the duly qualified and acting administrator of the estate of said F. L. Y.

That at the time of the death of said H. C. Y., he, the said Y., held two policies of accident insurance, which said policies were issued to him by plaintiff and were in force at the time of the death of said H. C. Y.; that the indemnity provided for by each of said policies in case of accidental death is the sum of dollars and dollars additional if the premiums were paid in advance at the time of death, making dollars as the maximum liability on each, that the numbers of said policies, respectively, are and

That said M. V. K. has made claim against plaintiff as the administrator of the estate of H. C. Y. on said policies

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for the aggregate sum of dollars; that said K. has also made claim against plaintiff as the administrator of the estate of said F. L. Y. on said policies for the same indemnity, aggregating dollars; that plaintiff denied any and all liability to said K. as administrator of either and both of said estates; that thereupon said K. instituted two separate suits against plaintiff in the court of the said county of, which suits are now pending and are returnable to the Term, 19.., of said court; that in one of said suits said K. is plaintiff as the administrator with the will annexed of the estate of said H. C. Y. and that in the other, said K. is plaintiff as the administrator of said F. L. Y., and that both suits are brought to recover the same indemnity on account of the said policies and that said K. claims to be entitled to said indemnity as administrator of each of said estates.

Plaintiff further states that by an agreement of compromise between plaintiff and said K. as administrator of each and both of said estates the total liability of plaintiff on said policies (which ever of said estates is entitled to said indemnity) has been fixed at the sum of dollars; that said agreement has been approved by said probate court and by an order of said probate court, which order is hereby referred to and made part hereof as fully as if copied in full herein; said K. as administrator of both said estates has been authorized and directed to settle and compromise the claims of each and both of said estates against plaintiff for the said sum of dollars; that said order of the probate court further provides that on account of the adverse claims of said estates to said dollars, the ownership of said dollars shall remain undetermined until adjudicated between the respective claimants in this proceeding and that upon the payment by plaintiff of said dollars to the clerk of the circuit court of the city of, State of, and the filing of this bill of interpleader by plaintiff in said court causing the legal representatives of said estates to interplead for said dollars among themselves, said K. as representative or administrator of both

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of said estates is authorized to execute and deliver to plaintiff an instrument of writing releasing and discharging plaintiff from all further claims of or liability to either and both of said estates, but said fund to be charged as assets against said K. as representative in that capacity only in which it may ultimately be shown that he holds said fund.

Plaintiff submits that said estates ought to interplead between themselves for said dollars, plaintiff being ready and hereby offering to pay the same to the clerk of this court to be paid by him to whichever of said estates this honorable court may determine to be entitled thereto.

Wherefore plaintiff prays:

First: That said K. in his capacity of administrator with the will annexed of the estate of said H. C. Y. may interplead together with said K. or such other person as may be appointed in his stead to represent the estate of said F. L. Y. *ad litem*, and that it may be ascertained to whom the said sum of dollars belongs and ought to be paid, and that plaintiff may be at liberty to pay said sum of dollars to the clerk of this court in trust in this cause (which plaintiff hereby offers to do) for the benefit of each of the said parties as shall appear to be entitled thereto.

Second: That upon the payment by plaintiff of said sum of dollars to said clerk as aforesaid it may be permitted to go hence without day and be discharged from all further liability to either or both of said estates on account of said policies of insurance.

Third: That the defendants may be restrained by the order and injunction of this court from further proceeding with said suits so commenced and from commencing any other action or actions at law against this plaintiff in respect of the matters aforesaid.

Fourth: For such other and further relief as to this court shall seem just.

.....
State of, City of, ss.

I, J. C. R., make oath and say that I am the attorney of the above named plaintiff, the U. S. C. C., that the facts

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above set forth are true, that the bill in this suit is not filed by it in collusion with either of the defendants in the said bill named, but such bill is filed by said plaintiff of its own accord for relief in this court.

945. INTERPLEA FILED BY ONE OF THE CLAIMANTS TO A FUND PAID INTO COURT UNDER A BILL OF INTERPLEADER.

Now comes M. S. G. and for his interplea in the above entitled action alleges, that he admits all the allegations contained in the petition filed herein, except as same may be denied or modified by the allegations contained in this interplea.

This interpleader alleges, that M. E. R., who had said certificate issued, as alleged in petition, had been sick for a number of months and that this interpleader, being at that time a practicing physician in the city of F., where the said M. E. R. lived, at the instance and request of said M. E. R., attended her during all the time she was sick prior to her death, and that he had furnished medicines and care for said M. E. R. during such time, at her special request and instance. This interpleader further says, that said M. E. R. was specially interested in having this interpleader paid out of the fund named in said Benefit Certificate, which she had caused to be taken out as alleged in said petition. That a month or six weeks prior to her death, knowing that she could not long survive, she, the said M. E. R., made an oral agreement or arrangement with the said M. F. D. whereby it was agreed by and between the said M. F. D. and said M. E. R., that she was to have a new Benefit Certificate issued by said plaintiff, naming said defendant, D., as a beneficiary to the amount of \$. and that he was to accept said sum as trustee and out of the same pay the interpleader's bill for medical attendance during the sickness of said M. E. R., and also the funeral expenses of said M. E. R.; that said defendant, M. F. D., then and there orally agreed that if such change was made in the Benefit Certificate, he would accept the same as trustee and after the death of M. E. R., and out of the same pay said funeral expenses

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and the amount coming to this interpleader for his medical attendance so given M. E. R. as aforesaid. Wherefore, this interpleader says, where in truth and in fact said M. F. D. is trustee for this interpleader as far as the said beneficiary is concerned to the amount due for his said services and care, so rendered as aforesaid. This interpleader further alleges, that the amount due him for medical attendance to M. E. R., is \$. This interpleader further says, that the said defendant, M. F. D., is not financially responsible, that he has given no bond to carry out the trust imposed upon him, as heretofore alleged, that unless this interpleader can have an order from this court directing out of the said Benefit Fund this claim be paid, that this interpleader will be unable to collect the same.

. Wherefore this interpleader asks for judgment directing the clerk of the above named court to pay this interpleader the sum of \$. out of the Benefit Fund named in said petition filed herein.¹

¹ From form in record in Gillam v. Dale, 69 Kan. 362.

Statutory provision for interpleader. Cob. Ann. Stat. Neb. 1911, sec. 1044; Gen. Stat. Kan. 1909, sec. 5635.

The statute is a substitute for the chancery rule or remedy of interpleader. A defendant sued for a fund or property in his hands is entitled to an order compelling a third party claiming such fund or property to interplead in the action. Hartford L. & A. Ins. Co. v. Cummings, 50 Neb. 236.

The remedy given by the statute does not supersede the action of interpleader. Board of Education v. Seoville, 13 Kan. 17.

CHAPTER CVIII.

REMOVAL OF CAUSES FROM A STATE COURT TO A UNITED STATES DISTRICT COURT.

- 946. Petition for removal on the ground of diversity of citizenship.
- 947. Allegation for removal on ground of prejudice and local influence.
- 948. Affidavit in support of petition for removal on ground of prejudice and local influence.
- 949. Allegation for removal on the ground of federal question involved.
- 950. Allegation for removal on ground of separable controversy.
- 951. Bond to be presented with petition for removal.

946. PETITION FOR REMOVAL ON THE GROUND OF DIVERSITY OF CITIZENSHIP.

Your petitioner herein states that it is the defendant in the above entitled cause and that at the date of the institution of this suit the defendant was, and ever since has been, and now is, a corporation duly organized and existing under the laws of the State of, and that since the date of its incorporation, to-wit: day of, 19.., it has been, and now is, a citizen of the State of, and non-resident of the State of in which state this suit is brought.

Your petitioner further states that the plaintiffs in said suit, all and each were at the time of the institution thereof, and ever since have been and now are citizens and residents of the State of

Your petitioner further states that the controversy in said suit is wholly between citizens of different states, to-wit: between your petitioner the defendant in said suit, a citizen of the State of at the time of the bringing of said suit, and at this time, and of said plaintiffs who, each and all of them, were then, and still are, citizens of the State of (x)

Your petitioner further states that said suit is of a civil nature (set out the nature of the cause of action pending).

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Your petitioner further states that the amount and matter in dispute exceeds, exclusive of interest and costs, the sum and value of three thousand dollars.

Your petitioner offers herewith a bond with good and sufficient surety for its entry in the district court of the United States for the division of the district of, on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the district court of the United States, if said court shall hold that this suit was wrongfully or imperfectly removed thereto.

Your petitioner prays this honorable court for the removal of this suit before the trial thereof into the district court of the United States in and for the division of district of

Your petitioner further prays this honorable court to proceed no farther herein, except to make an order for the removal of this case to said United States district court, and to accept the said surety and bond, and to cause the record herein to be removed into the district court of the United States in and for the division of the district of and it will ever pray.

(Affidavit.)

State of,
County of } ss.

..... being duly sworn on his oath states that he is the petitioner (or attorney or agent for the petitioner) in the above entitled suit and that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge and belief.

(Signature.)

Subscribed and sworn to, etc.¹

¹ A court should disregard an improper or sham party who has injected a fictitious cause of action into the case and may arrange the actual parties on opposite sides of the real controversy according to their respective interests, and if there then appears to be a controversy between citizens of different states, involving the requisite amount, the cause may be removed. *Boatmen's Bank v. Fritzlen*, 75 Kan. 479.

A petition for removal is filed in time if it is filed by the defendant

REMOVAL OF CAUSES.

947. ALLEGATION FOR REMOVAL ON GROUND OF PREJUDICE AND LOCAL INFLUENCE.

In the district court of the United States for the district of

(Parties.)

Your petitioner states that has filed a suit in the court of the county of wherein said is plaintiff and your petitioner is defendant, and that said

as soon as the record in the cause or the acts of the parties show it to be a removal cause. *Boatmen's Bank v. Fritzlen*, 75 Kan. 479.

Formal defects in a petition to remove a cause from the state to the federal court are waived by appearing in the latter court and moving to remand on the ground that the alleged cause for removal does not exist. *Tomson v. Iowa State Traveling Men's Ass'n*, 78 Neb. 400.

Cannot be removed from a state court after a hearing has been had in the state court on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action. *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412.

The filing of the requisite petition for removal, accompanied by a legal and sufficient bond, instantly operates to transfer a removable case from the state to the federal court. A plaintiff who has demanded a recovery from defendant of more than \$2,000 cannot defeat a removal by an amendment of his petition reducing the amount of his demand, after a proper and sufficient petition and bond for a removal have been filed. *Chicago, Rock Island & Pacific Ry. Co. v. Stone*, 70 Kan. 708.

But the mere filing of a petition for the removal of an action to the circuit court of the United States, which is not removable, does not work a transfer; and the state court is at liberty to determine for itself whether on the face of the record, a removal has been effected. If the petition for removal is not filed within the time prescribed by the statutes of the United States, the state court, having once acquired jurisdiction may proceed and try the cause. *Larson v. Cox*, 39 Kan. 631.

Issues of fact raised by a petition for removal are to be tried in the federal court. *Boatmen's Bank v. Fritzler*, 75 Kan. 479.

The only question for the state court to decide is one of law, whether admitting the facts alleged in the petition and disclosed by the record to be true, the cause is a removable one. *Boatmen's Bank v. Fritzler*, 75 Kan. 479.

The petition must set out facts showing that the cause is removable from the state to the federal court. *Blair v. West Point Mfg. Co.*, 7 Neb. 146.

Proceedings where petition for removal is denied by state court. *Bolen-Darnell Coal Co. v. Kirk*, 25 Okla. 273.

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suit is made returnable to the term of the court of the county of and that said suit is now pending in the court of said county.

Your petitioner further states that the controversy in said cause is between citizens of different states, and that the plaintiff in said cause was at the time of the commencement of said suit, and still is a citizen of the State of and a resident of the county of in said state, and that your petitioner was at the time of the commencement of said suit, and still is a citizen of the State of and resides in the county of in said State of

Your petitioner further states that because of the prejudice and local influence in favor of the plaintiff in said cause, and opposed to your petitioner the defendant, your petitioner will not be able to obtain justice in said state court where said suit is now pending, or in any other state court to which said defendant may by right remove said cause, under the laws of the state on account of such prejudice and local influence.

Your petitioner further states that said suit is of a civil nature (set out nature of cause of action pending) and that the amount and matter in dispute exceeds, exclusive of interest and cost, the sum and value of three thousand dollars.

Your petitioner presents herewith a bond with good and sufficient surety conditioned upon the payment of all costs that may be taxed by this court, if upon removal this court shall hold that this suit was wrongfully and improperly removed hereto.

Your petitioner prays this honorable court for the removal of this suit before the trial thereof from said state court wherein the same is pending into this court and that said bond may be accepted by this court and that certiorari issue for the removal of said cause from the circuit court, and he will ever pray.

(Signature.)

State of,
County of } ss.

..... being duly sworn on his oath states that he is attor-

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ney for the petitioner in this case and that the statements contained in the petition attached hereto are true to the best of his knowledge and belief.

(Signature.)

Subscribed and sworn to, etc.²

948. AFFIDAVIT IN SUPPORT OF PETITION FOR REMOVAL ON GROUND OF PREJUDICE AND LOCAL INFLUENCE.

State of }
County of } ss.

..... being duly sworn on his oath states that he is an attorney at law and as such represents, a corporation organized and doing business under the laws of the State of, and that said corporation is the defendant in a certain suit pending in the court of the county of and State of, and that said defendant has presented to this honorable court a petition praying for the removal of said cause from said court to this honorable district court of the United States in and for the division of the district of, on the ground of the prejudice and local influence existing in the county where said suit is pending, and that he is authorized by said corporation to make this affidavit in behalf of the corporation; that he has read the petition for removal and knows that the statements made therein are true; that he is well acquainted with the conditions existing in the county where said suit is pending, and knows that the inhabitants of said county are prejudiced against the petitioner who is a corporation, well known throughout the entire county, and that because of this prejudice and local influence existing in said county, it will be impossible to secure a jury which will not be prejudiced against the defendant, and that for this reason the defendant in said cause will not be able to obtain justice in said state court.

Affiant further states that he is acquainted with the con-

² A plaintiff who institutes an action in the state court cannot remove the same to the United States circuit court on account of prejudice or local influence. Meyer Bros. Drug Co. v. Malm, 47 Kan. 762.

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• ditions and circumstances existing throughout the other counties of the state to which this cause might be removed by change of venue, and that he knows in these counties the defendant in this case is well known by the inhabitants of said counties, and that there exists against this defendant a prejudice which would prevent the defendant from securing a jury from the inhabitants of said counties that would be unbiased, and for that reason the said affiant would be unable to obtain justice in any county in the state to which said cause might be removed in accordance with the laws of said state.

(The affidavit should contain all of the facts within the knowledge of the affiant showing that prejudice or local influence exists both in the county where the suit is pending and in other counties throughout the state to which it might be removed by change of venue or otherwise.)

(Signature.)

949. ALLEGATION FOR REMOVAL ON THE GROUND OF FEDERAL QUESTION INVOLVED.

Your petitioner herein states that he is the defendant in the above entitled cause, and that at the time of the institution of this suit the defendant was, and ever since has been, and now is a citizen of the State of, and that said plaintiff was at the time of bringing said suit, and still is a citizen of the State of

Your petitioner further states that the suit herein is of a civil nature at law, and that a Federal question arising under the Constitution and laws of the United States is involved, and that the petition filed in said cause shows that the controversy involving a Federal question arises from the following facts: (set out the facts showing that a Federal question is involved).

Conclude as in form No. 946 from (x).²

Subscribed and sworn to, etc.

² Where a party files the required petition and bond, and procures the removal of a cause from a state court to the United States circuit court, on the ground that it arose and presents an issue under the laws of the United States, and the latter court determines that question

REMOVAL OF CAUSES.

950. ALLEGATION FOR REMOVAL ON GROUND OF SEPARABLE CONTROVERSY.

Your petitioner herein states that he is one of the defendants in the above entitled suit, and that there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, namely, a controversy between your petitioner, who states that he was at the time of the bringing of this suit, and still is a citizen of the State of, and that said plaintiff, was at the time of the bringing of this suit, and still is a citizen of the State of; that said controversy is of the following nature, to-wit: (set out the nature of the separable controversy) that your petitioner and the plaintiff in this suit are both actually interested in said controversy.

Conclude as in form No. 946 from (x).

against the petitioner, and remands the cause, which decision is acquiesced in and unreversed, the question so determined is *res judicata*, and cannot be again inquired into in the court to which the cause is remanded. *Bodley v. Emporia National Bank*, 38 Kan. 59.

In an action where the amount of damages claimed by reason of a wrongful levy and sale of goods by a United States marshal and his deputy exceeds \$3,000 exclusive of costs, they may remove the cause into a United States circuit court. To entitle them to do so, however, they must plead justification under the process of that court. A general denial of the facts stated in the petition, where the action is for the wrongful taking and sale of the goods, is not sufficient to show justification. *Howard v. Stewart*, 34 Neb. 765.

In an action against a railroad corporation to recover damages for the destruction of a field of rye by the diversion of a natural water-course, the corporation filed a petition for removal to the federal court on the ground solely that it was a corporation organized under the act of Congress to aid in the construction of a railroad to the Pacific. The petition was properly denied. *Union Pacific Ry. Co. v. Dyche*, 31 Kan. 120.

A petition for removal from a state court upon the ground that a federal question is involved, must state facts from which the court may determine whether or not a federal question is involved, and it must show that the pleading of the plaintiff is based upon such facts as will involve a federal question in the determination of the controversy. *Gibbs v. Crandall*, 120 U. S. 105.

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951. BOND TO BE PRESENTED WITH PETITION FOR REMOVAL.

Know all Men by These Presents:

That we, ... of the county of in the State of, as principal, and of the county of and State of, as surety, are held and stand bound unto in the penal sum of dollars for the payment of said amount well and truly to be made, we do severally and jointly bind ourselves, our heirs, representatives and assigns by these presents.

The condition of the above obligation is as follows: Whereas, said has presented his petition in the court of the county of and State of, praying for the removal of a certain cause therein pending, wherein is plaintiff and is defendant into the district court of the United States, in and for the division of the district of

Now, therefore, if the said shall enter in the district court of the United States, for the division of the district on the first day of the next term a copy of the record in said cause, and shall pay all costs that may be awarded by said district court of the United States for the division of the district, if that court shall hold that said cause was wrongfully or improperly removed into said court, then this obligation shall be void, otherwise it shall remain in full force and effect.

Witness our hands and seals this day of, 19...

.....
.....

CHAPTER CIX.

TAX SUITS.

- 952. Action to foreclose tax sale certificate.
- 953. Action praying for foreclosure of a tax lien and for equitable relief.
- 954. Action to foreclose a tax lien.
- 955. Action to enjoin the collection of an excessive tax levy.
- 956. Action to recover tax paid under protest alleged to have been illegally levied.
- 957. Action by county treasurer to recover taxes on personal property.
- 958. Petition for certificate of error.
- 959. Action under the "Scavenger Act" to recover taxes on land (Nebraska).

952. ACTION TO FORECLOSE TAX SALE CERTIFICATE.

The plaintiff complains of the defendants and for cause of action alleges:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

2. That on the day of, 19.., A. J. S. purchased at private tax sale of the treasurer of D. county, Nebraska, the following described real estate situated in said county, to-wit: (here describe), and paid said county treasurer the amount of all taxes delinquent thereon and subject to sale at said date, together with interest and costs amounting to dollars, as follows, to-wit: State and county taxes for year, \$.; (set out other taxes); that said purchaser received therefor a certificate of tax sale, a copy of which is hereto attached, marked "exhibit A" and made a part hereof.

3. Plaintiff further alleges that the holder of said certificate, the said A. J. S., paid as required by law the following taxes upon said real estate, to-wit: On

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....., 19.., state and county taxes for year 19.., amounting to \$.....

4. Plaintiff further alleges that said real estate was subject to taxation for general purposes for each of the years named, and particularly subject to each of the taxes above set forth; that each of said items of taxes was duly assessed and levied upon the above described real estate by the proper authority, after all preliminary steps leading up thereto had been taken in all respects as provided by law.

5. Plaintiff alleges that said A. J. S. has for value duly assigned said certificate by endorsement to the plaintiff, including the lien of all taxes paid thereunder, and plaintiff is now the owner and holder of said certificate and lien.

6. Plaintiff further alleges that said real estate has not been redeemed from said sale, nor has said lien or any part thereof been canceled or paid, and there is now due to the plaintiff upon said certificate and lien the several amounts paid as set forth in paragraphs two and three hereof with interest as provided by law.

7. Plaintiff further alleges that said defendant H. L. is the owner of said real estate; that the defendants (set out names), have or claim to have some right or interest in said real estate or a part thereof by reason of mortgage judgment or other liens, the exact nature of which and of each thereof is unknown to plaintiff, but plaintiff alleges that whatever rights or interests said defendants or either may have or claim in or to said real estate or any part thereof are and each is inferior and subject to the said lien of this plaintiff arising under said tax sale as aforesaid.

Wherefore, plaintiff prays that an account may be taken of the amount due this plaintiff upon its said certificate and lien; that the several amounts paid as aforesaid with interest thereon at the rate of twenty per cent. per annum for two years from the dates of their respective payments, and at the rate of ten per cent. per annum thereafter may be adjudged and decreed to constitute a first and paramount lien upon the above described real estate superior to the rights and interests of the defendants and each, and that

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said lien be by decree of this court foreclosed, and that the equity of redemption or other rights or interests of the defendants and each in and to said real estate and every part thereof be forever barred and foreclosed by this action, and that said real estate be sold as upon execution by order of this court to satisfy the amount due plaintiff thereon, with interest and an attorney's fee equal to ten per cent. of the decree, together with the costs of this action, and that plaintiff have such other and further relief as may be just and equitable in the premises.¹

953. ACTION PRAYING FOR FORECLOSURE OF A TAX LIEN AND FOR EQUITABLE RELIEF.

Comes now the plaintiff, the F. L. & T. Co., and for cause of action herein against the defendants, states:

1. That it is a corporation duly and legally incorporated under and by virtue of the laws of the State of, and doing business in said state and the State of;

2. That included in the powers of said corporation are the rights to invest in tax sale certificates, and to buy, own and control real estate;

3. That the real estate above mentioned and made defendant to this action, and which is described as follows, to-wit: (describe), in H. county, Nebraska, was subject to taxation for the year and every year subsequent thereto: that for the year first mentioned said property was duly, legally and regularly assessed by the proper assessor, and under such assessment taxes thereon were duly and legally levied and imposed for said year;

4. That the taxes so assessed and levied upon said real estate became and remained due, delinquent and unpaid, and that at the regular public tax sale, made and held in said H. county, at the office of the county treasurer, in O., Nebraska, on the Monday of, 19.., for the sale of lands for the non-payment of taxes, said property was offered for sale by the said county treasurer to the highest

¹ From form in record in Continental Trust Co. v. Harvey Link, 79 Neb. 29.

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bidder therefor for the taxes, interest and costs then due thereon, which had become and remained delinquent and unpaid under the assessment and levy aforesaid, and the same was not sold for the want of bidders therefor.

5. That after said public tax sale was closed, the said county treasurer made his return thereof to the county clerk of said county, and filed the same in the office of said clerk in the time and manner provided by law, and that thereafter to-wit: On the day of, 19.., at a regular private tax sale held at his office, the county treasurer of said county sold said real estate to W. G. P. for the plaintiff herein for the amount of taxes, penalty and the costs thereof then due and delinquent, at which time such purchaser paid to said treasurer the amount of such sale, to-wit: The sum of dollars and that pursuant thereto said county treasurer issued and delivered to the plaintiff a certificate of said sale.

6. That taxes for the years and on said real estate were regularly and legally assessed and levied at the time and in the manner and form prescribed by statute; that the same became and remained due, delinquent and unpaid, and that under and by virtue of such sale, the plaintiff herein paid the same to the county treasurer of said county, as follows, to-wit: (set out payments).

7. That thereafter and not less than three months nor more than five months before the expiration of two years from the time of such tax sale, the plaintiff as the owner of such tax sale certificate served notice on every person in actual possession of such real estate, and the person in whose name the same was taxed, and on the owner and occupant thereof, which notice stated when plaintiff purchased such land, in whose name the same was taxed, the description of the land purchased, for what year taxed, and when the time of redemption from said sale would expire, in the manner required by Section, of Chapter of the Revenue Laws of the State of Nebraska, and made proof by affidavit to the county treasurer of said county of the compliance with said statute, and that in serving said notice

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and making and filing said affidavit, plaintiff incurred and expended actual and legal costs in the sum of dollars, no part of which has been paid to or received by this plaintiff:

8. That after the making of said proof and upon the compliance with all the provisions of the statutes of said State of Nebraska relating thereto, and at the expiration of the time of redemption from such sale, to-wit: On or about the day of, 19.., the county treasurer of said H. county, Nebraska, executed and delivered to the plaintiff a deed purporting to convey to plaintiff the land hereinbefore described, which deed was by this plaintiff placed on record in the office of the county clerk and register of deeds of said county, and that in the taking and recording of said deed, plaintiff has incurred and expended actual and legal costs in the sum of dollars, no part of which has been paid to or received by this plaintiff.

9. That the owner of said real estate is not known and that the defendants J. & G., J. J. and W. G. have or claim to have some title to, interest in or lien upon said premises, and claim that said treasurer's deed so executed and delivered to this plaintiff was, and is defective and void, and conveyed to plaintiff no title to said premises, but plaintiff alleges the fact to be that whatever rights, claims, liens or interest said defendants or any of them may heretofore have had in or to said property, the same have been entirely cut off and extinguished by reason of the execution and delivery to plaintiff of said tax deed, and that if for any reason said deed is defective, then plaintiff alleges that its lien on said property for the taxes, interest and costs so paid by it, as hereinbefore alleged, is senior and paramount to all rights, claims, liens and interests of any of the defendants and of any and all other persons:

10. That no action at law has been commenced for the recovery of said taxes, interest and costs, or any portion thereof, and no judgment has been rendered therefor; neither has plaintiff received the same or any part thereof:

11. That said real estate is not worth more in value than the sum of all the taxes, interest and costs so paid by the

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plaintiff, as set out in this petition, and that plaintiff's claim therefor including interest and attorney's fees, amounts at this date to-wit: The day of, 19.., the sum of dollars; and plaintiff further states that the granting of an ordinary decree of foreclosure in this action, which will make it necessary for said real estate to be appraised, advertised and sold by the sheriff or other officer, will largely increase the costs to be paid by the plaintiff herein and render its investment in the said property more than the same is worth:

Wherefore, plaintiff makes the real estate set out in this petition a party defendant in this action and asks that the estate and interest of each and all of the parties hereto, in and to the same be determined; that a decree be entered by the court fixing, establishing and quieting the title of the plaintiff to said premises as against the adverse claims of all the persons who are named as parties defendant, and against all other persons who may have at this time or at any time hereafter any interest therein or claim thereto adverse to the title and estate of plaintiff, and that said defendants, and each of them and all other persons be forever barred and estopped from having any estate or interest in said premises adverse to the estate and title of plaintiff.

And plaintiff further asks that in case it be found upon the hearing and trial of this action that said tax deed is defective, and that plaintiff does not have thereunder a good and perfect title to said property, then that the plaintiff be decreed to have a lien upon said real estate for the sums so paid by it as taxes, interest and costs, with interest thereon at the rate of per cent. per annum for two years from the several times of payment, and at the rate of per cent. per annum thereafter; the further sum of per cent. of the total amount of said decree as attorney's fees, and the costs of suit; that the defendants be required to pay such lien with interest and costs to plaintiff within a reasonable time, to be fixed by the court; and upon their failure so to do the title of said real estate be established and quieted in plaintiff, free and clear of any and all

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claims, liens and interests of said defendants, or any of them, and all other persons, and that plaintiff have such other and further relief as may, by the court be deemed to be equitable in the premises, including a decree for an ordinary foreclosure of said tax lien, as provided by statute, if the court finds that the plaintiff is entitled to no other or fuller relief.²

954. ACTION TO FORECLOSE A TAX LIEN.

The plaintiff for a cause of action says, that the county of K. is a duly organized county of the State of Kansas; that the lands hereinafter mentioned, were duly assessed for taxation in said county, and taxes levied on each of said tracts of land for the years preceding the date of the sale hereinafter mentioned, and that all of said tracts of land could not be sold for the amount of the taxes and charges then due, at the time of each respective sale, and said lands were bid off by the treasurer of said county, in the name of the county of K., and that said lands or either of said tracts have not been redeemed as required by law, and the certificates of sale have not been transferred or assigned, and the period of more than three and one-fourth years have elapsed from the date of each respective sale; that the said Board of County Commissioners of said county, did on the day of, 19..., make an order directing the county attorney of said K. county, to institute a civil action in the district court of K. county, Kansas, against the owners and other persons interested in said lands or either of them, to foreclose the tax liens against each of said tracts of lands under Chapter of the Laws of 19... That the following is a list of said lands, with the date of said respective tax sales, and the amount of taxes, interest and penalties charged to each tract of land, calculated to the day of, 19..., and the names of the owners and other persons having an interest in each tract of land: (Here give description of property and names of owners). All of said

² From form in record in Farmers Loan & Trust Co. v. Joseph & Grafe, 86 Neb. 256.

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lands situated in the county of K., in the State of Kansas. That the subsequent taxes, levied and assessed upon each of said tracts and the interest, penalties and charges are included in the foregoing statement of amounts. That said amounts respectively, following each description as above, is the amount of taxes, interest and penalties and all costs, which is legally due and is a legal lien upon each respective tract of land.

Wherefore plaintiff prays, that the court shall determine the amount of taxes, interest and penalties chargeable to each of the above mentioned tracts of land, and the names of the owners or persons having an interest in each tract, and that the court shall decree the amount so found due on each tract, to be a first and prior lien upon each respective tract, and that the same be sold at public sale to satisfy such lien and costs and for such other relief as the plaintiff may be entitled to, with costs of suit.³

³ From form in record in *Williams v. Board County Commrs.*, Kiowa County, 74 Kan. 693.

A petition to foreclose a tax lien which conforms substantially to the requirements of the statute is sufficient. *Hull v. Miller*, 4 Neb. 503.

An action to foreclose a tax lien on real estate may be brought on the tax certificate where it is alleged in the petition that a deed would be invalid if issued, and such action may be brought within the same time as if brought on a tax deed, the title under which had failed. A notice to redeem is not indispensable before bringing an action to foreclose a tax lien, although the failure to give such notice in certain cases may affect the question of costs. *Helphrey v. Redick*, 21 Neb. 80; *Lammers v. Comstock*, 20 Neb. 341; *Parker v. Matheson*, 21 Neb. 546.

The holder may join as many tracts or descriptions of real estate belonging to one defendant upon which he has a tax lien as he may see fit. In such case the tax due upon each tract will constitute a separate cause of action, and should be separately stated and numbered. *McNish v. Perrine*, 14 Neb. 582.

That a petition for foreclosure of a tax lien discloses that no preliminary sale for taxes was had will not of itself render the foreclosure proceedings totally void, if had *coram judice*, and with jurisdiction of the parties. *Selby v. Pueppka*, 73 Neb. 179.

A petition in equity for the foreclosure of a lien for taxes, paid by the purchaser of real estate sold for delinquent taxes and subsequent taxes paid thereon, is not so fatally defective as to preclude a decree in plaintiff's favor being based thereon, because it does not allege that there have been no proceedings at law had or begun for the recovery

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955. ACTION TO ENJOIN THE COLLECTION OF AN EXCESSIVE TAX LEVY.

Comes now the plaintiff and for its cause of action against the said defendants, alleges and avers that heretofore and in, to-wit, the year 19..., it was and is now a corporation duly organized and existing under the laws of the State of

of the amount for which a lien is claimed, or any part thereof, such petition containing other proper averments. *Carman v. Harris*, 61 Neb. 635.

A purchaser at a tax sale is not required to give the notice to redeem mentioned in section 3, article 9, of the constitution of Nebraska, to maintain an action to enforce a tax lien. *Van Etten v. Medland*, 53 Neb. 569.

Under the revenue law in force in 1901 (Nebraska), a petition by a county to foreclose a tax lien, which fails to allege an antecedent sale for taxes by the county treasurer, does not state a cause of action, but the judgment rendered thereon is not void, and the charge in the petition collaterally attacking the same that the party claiming under such judgment knew there had not been an antecedent sale does not make such case an exception to the rule. *Cass v. Nitsch*, 81 Neb. 228.

All lands sought to be sold for delinquent taxes should be described in the petition. It is not sufficient to describe the lands in an exhibit not made a part of the petition. *Spicer v. Wheeler*, 53 Kan. 424.

Form of petition to foreclose a tax lien. *D'Gette v. Sheldon*, 27 Neb. 829.

Injunction is a proper and legal remedy to restrain the collection of illegal taxes. *Stiles v. Guthrie*, 3 Okla. 26; *Cranmer v. Williamson*, 8 Okla. 683.

In an action to enjoin the collection of taxes resulting from an order of a board of equalization, where it is claimed a remedy by an error proceeding would be inadequate, the facts upon which such claim is based must be pleaded and proved. *Webster v. Lincoln*, 50 Neb. 1.

Taxes levied on an assessment arbitrarily increased above a proper value may be enjoined. *Board of County Com'rs v. Lang*, 8 Kan. 196.

Petition to enjoin the collection of a tax alleged to be illegal and excessive, must allege that the property was listed and returned for assessment at its true cash value, and that the board of equalization raised the valuation above the returned valuation. *Alva State Bank v. Renfrew*, 10 Okla. 26; *Streight v. Durham*, 10 Okla. 361.

A petition which alleges that a tax has been levied for the purpose of paying a judgment which is void by reason of having been rendered in excess of the 4 per cent. limit, without stating facts necessary to show that such judgment is void, does not state a cause of action; and it is not sufficient to authorize a court of equity to restrain the collection of such tax. *Weber v. Dillon*, 7 Okla. 568.

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Kansas and owned, possessed, controlled and operated a certain line of railway into and through the county of and State of Oklahoma, and that the board of railway assessors of said state for the year 19.. assessed all of the railroad property of the said plaintiff, in said county, at and for the sum of dollars, and that thereafter levies of various taxes for various state, county and municipal purposes were levied for the same year, and that the said board of county commissioners for said county attempted to levy for said county for the purpose of paying county salaries, a levy of mills on the dollar valuation of the said county, and that the total assessed valuation of said county is the sum and amount of dollars including the property of this plaintiff, so assessed for taxation in said county, and that the total salaries to be paid out of the salary fund of said county, as fixed and established by law for the year 19.., was only the sum of dollars and that as against said sum there was the sum of at least dollars arising from saloon licenses and other sources than the ordinary taxation to be applied thereto and credited thereon. That the tax levy so made for the purpose of paying county salaries, by the said board of county commissioners, on the property of this plaintiff alone, amounted to the sum of dollars and being more than sufficient to pay and discharge all of the county salaries properly chargeable to said fund; and that the said levy of taxes on the taxable property of said county for county salaries was more than double the amount necessary to pay each and all of said salaries, and that a levy of mills is more than sufficient to raise all necessary revenue to pay all of the charges properly chargeable to the said county salary fund, including per cent, for contemplated delinquent taxes.

That the said plaintiff has paid of its said taxes mills, levied for such purpose, and all of its other taxes except mills of the said levy so levied for the purpose of paying said county salaries, which said sum is excessive, illegal and unjust, and which said sum the said county treasurer of said county is now threatening to collect, and will

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issue his warrant for the collection thereof, and cause the same to be levied of the property of this plaintiff unless restrained from so doing.

That plaintiff has no other adequate relief at law, and therefore prays that the said defendants and each of them, be perpetually enjoined from collecting or attempting to collect, or issuing any warrant for the collection of the sum of dollars of the said unlawful levy, so as aforesaid, made for the purpose of paying county salaries and that the plaintiff in the meantime be granted a temporary injunction against the collection of said sum, and on the final hearing thereof that the said injunction may be made perpetual.

State of Oklahoma, }
..... County, } ss.

J. R. C., of a lawful age, being first duly sworn, upon his oath deposes and says, he is one of the attorneys for the plaintiffs in the above action; that he has read the above petition and knows the contents thereof and each, all and every of the allegations therein contained are true.

J. R. C.

Subscribed in my presence and sworn to, etc.⁴

⁴ Form in *Atchison, T. & S. F. Rd. Co. v. Wiggins*, 5 Okla. 477.

In an action to restrain the sale of lands for taxes as against a demurrer, allegations in a petition that the plaintiff is the owner of the lands, and that the same were not subject to taxation for a given year, will be deemed sufficient as statements of fact. *Leavenworth, L. & G. R. Co. v. Leahy*, 12 Kan. (124) 103.

A court of equity will not enjoin the collection of any portion of a tax unless the petitioner tenders that portion over which there is no dispute, if there be any, and offers in his petition to pay such further portions thereof as the court may find to be just. *Lasater & Noble v. Green*, 10 Okla. 335. ²

A party seeking to have a tax deed declared void on the ground of the mere failure of the assessor to comply with the statute, must pay or offer to pay all taxes justly chargeable against the land. *Boeck v. Merriam*, 10 Neb. 199.

Allegations of petition to restrain collection of taxes considered and held insufficient. *Commissioners of Osborne Co. v. Blake*, 19 Kan. 299.

Form of petition to enjoin the collection of an alleged illegal tax. Sustained on demurrer in *Touzalin v. Omaha*, 25 Neb. 817.

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956. ACTION TO RECOVER TAX PAID UNDER PROTEST ALLEGED TO HAVE BEEN ILLEGALLY LEVIED.

1. Plaintiff alleges that for said year 19.. the taxing authorities of the defendant levied and assessed taxes for bridge purposes upon the property of the said county and upon the property of the plaintiff hereinbefore alleged at the rate of two mills on the dollar valuation; that said tax upon the property of the plaintiff amounted to the sum of \$.; and that for the same year the said defendant by its taxing officers levied and assessed taxes upon the property of the plaintiff and the other property taxable in said county for general fund purposes at the rate of 9 mills on the dollar valuation.

2. Plaintiff further alleges that said levy of two mills for bridge purposes was unauthorized by law; that it was far in excess of the amount necessary or likely to be needed for the maintenance of the bridges of said county and for any purposes for which said tax might lawfully be levied. That at the time of making said levy and of collecting said taxes the bridge fund of said county should have been well supplied, and there should have been on hand in said fund large sums of money such as would not require any levy for said year for said bridge fund and that said levy was made unjustly, excessively and without authority of law, and said tax was illegal, null and void, and was made for said bridge fund, when if the funds properly belonging to said bridge fund had been maintained and preserved therein no levy for said bridge purposes would have been necessary for said year, and that said tax was levied fraudulently, unnecessarily and unlawfully in order that said bridge and fund tax might be unduly and excessively large for the sole purpose that the surplus arising therefrom might be transferred to the general fund of said county and thereby to increase said fund above the lawful limit and rate of taxation permitted for said fund at the rate of 9 mills on the dollar valuation.

3. Plaintiff further alleges that said levy of 2 mills for bridge purposes so unnecessarily and unlawfully made for the year 19.. is one of the series of said excessive and illegal

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levies by which said bridge fund has been unlawfully increased in order that a large surplus might be made for this year to be transferred to the general fund of said county; and that during each of said years as hereinafter alleged said county had levied its maximum rate of 9 mills for general fund purposes.

4. That for the year 19.. said county estimated and levied taxes upon the basis of said estimate for bridge fund purposes the sum of \$....., and that out of the sum collected for said year for said fund \$..... thereof was transferred to the general fund of said county as unused and unnecessary for the expenses chargeable against said bridge fund.

(Paragraphs 5, 6 and 7 allege levy and amount collected for bridge fund, for three successive years.)

8. Plaintiff further alleges that each of said levies above indicated and the transfers from said bridge fund to the general fund of said county for said years were excessive, above the amount necessary to meet the ordinary or probable expenses chargeable against said bridge fund; that the levy and collection of a sum so greatly in excess of the amount needed for the reasonable expenses of said bridge fund and the transfer of the same to the general fund of said county for which there has already been made in each of said years a levy of 9 mills on the dollar valuation was made for the purpose of evading the legal limit of 9 mills on the dollar valuation for said general fund, and of collecting from the taxpayers of said county and the plaintiff herein a sum larger than by law permitted for each of said years and especially for the year 19.., and was a fraud upon the plaintiff and the other taxpayers of said county and that if the amounts levied for said bridge fund had been preserved and kept in said fund that no tax for said fund would have been necessary for the year 19.., and that the levy of said excessive amounts and the transfers thereof unlawfully to said general fund rendered said tax of \$..... for said bridge fund upon the property of the plaintiff, excessive, illegal, null and void.

9. Plaintiff further alleges that when it paid its other

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taxes to said county on or about, 19.., it paid under protest said bridge tax in the sum of \$., and then and there demanded of said county and its treasurer that said sum be refunded and paid back to the plaintiff, which said county and its treasurer then refused to do.

10. Plaintiff attaches to this petition as a part thereof its protest against the payment of said \$., and its demand for the repayment and return of the same as exhibit B.

11. Plaintiff therefore alleges that there is due to the plaintiff from the defendant on account of the road taxes unlawfully collected the sum of \$. and on account of said unlawful bridge fund tax the sum of \$. with interest upon each of said sums at per cent. from, 19..

Wherefore plaintiff prays judgment against the defendant in the sum of \$. with interest on the same at per cent. and costs of suit.⁵

⁵ From form in record in *Lincoln Co. v. C. B. & Q. R. Co.*, 77 Neb. 99.

In an action to recover taxes paid under protest, if allegations of the petition of the illegality or invalidity of the taxes or reasons which render them unenforceable are not admitted, the burden of their proof is on the pleader. *Davis v. Otoe County*, 55 Neb. 677.

In an action to recover taxes paid under protest, the claimant must allege in his petition and prove at the trial that he made specific objection to the tax at the time he paid it. *Bankers Life Ass'n v. Commissioners of Douglas Co.*, 61 Neb. 203.

Sufficiency of allegations. A petition which alleges the sale and conveyance of land for taxes which was not subject to taxation; that it was subsequently adjudged in a court of competent jurisdiction that the land was not taxable, and that the sale and conveyance were invalid; that a quit claim deed by the holder of the tax title was tendered to the board of county commissioners and application made, in due time, for the refunding of the taxes and charges paid on the land, states a cause of action against the board. *Topeka Commercial Security Co. v. Harper County*, 63 Kan. 351.

Form of petition to recover taxes paid to county treasurer under protest. Sustained on demurrer in *Atchison, Topeka & Santa Fe Ry. Co. v. Board of Sumner Co.*, 76 Kan. 618.

Form of petition to recover taxes paid under protest. *Red Willow Co. v. C. B. & Q. Ry. Co.*, 26 Neb. 660.

Necessary allegations in petition against a board of county commissioners for refund of money paid on tax certificates. *Board of Com'rs of Saline Co. v. Geis*, 22 Kan. 271.

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957. ACTION BY COUNTY TREASURER TO RECOVER TAXES ON PERSONAL PROPERTY.

The plaintiff for cause of action alleges that he is the duly elected, qualified and acting county treasurer of N. county, Nebraska, and as such county treasurer has the collection of all taxes of said county.

That he as such county treasurer has been directed by the board of county commissioners of said county to institute legal proceedings against the said defendant, W. H. H., for the collection of the delinquent taxes for the year 19.. and interest and costs of collection.

That this said plaintiff has been unable to find any personal property of the said defendant out of which to collect said delinquent personal tax as above described and therefore has been unable to collect said taxes.

Plaintiff further alleges that the said defendant was duly assessed in the year 19.... to the amount of \$. as personal tax and that the said tax was duly certified to the then acting county treasurer of said N. county and that the same stands upon the books of the said county treasurer as unpaid and still a valid debt due this said plaintiff as county treasurer of said N. county, from this said defendant W. H. H., together with interest thereon.

Plaintiff further alleges that there is now due to this said plaintiff as county treasurer of said N. county, Nebraska, from this said defendant, the sum of \$. for delinquent tax for the year 19.. and interest thereon from said date to the present time.

Wherefore this plaintiff as county treasurer of said N. county prays judgment against said defendant W. H. H. for the sum of \$. for said delinquent personal taxes for

Form of petition in action to recover money paid into the treasury of the county on tax sale certificate. Comm'rs of Lincoln Co. v. Faulkner, 27 Kan. 164.

Form of petition in action to recover from the county the amount paid for land which was not subject to taxes. Wilson v. Butler Co., 26 Neb. 676.

Same—Another form. Roberts v. Adams Co., 18 Neb. 471.

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the year 19.... and interest, costs of collection and costs of this suit.⁶

958. PETITION FOR CERTIFICATE OF ERROR.

Application of the P. M. Co. for certificate of error.

Comes now the P. M. Co., by D. R. M., and complains to the honorable board of county commissioners that the taxes assessed against him for the year 19.. are erroneous and excessive; that the original assessment made by the assessor was raised beyond all reason by the city board of equalization, without authority of law and by reason of a mistake made by the city board, as evidenced by exhibit A, hereto attached and made a part hereof. Your complainant therefore prays that a certificate of error in the sum of \$..... be issued to said P. M. Co. by said board of county commissioners:

Amount charged on tax rolls:

Real estate, value \$....., taxes.....	\$.....
Personal, value \$....., taxes.....	\$.....
Amount as per schedule and exhibit A.....	\$.....
Real estate and personal, \$.....	\$.....
Taxes erroneously charged.....	\$.....

(Signed) P. M. Co.

Subscribed and sworn to, etc.⁷

959. ACTION UNDER THE "SCAVENGER ACT" TO RECOVER TAXES ON LAND (NEBRASKA).

For its cause of action the plaintiff alleges and shows to the court that under and by virtue of the laws of the State of Nebraska, taxes have been duly levied for state, county and city purposes upon the several parcels of real estate hereinafter described, as set forth in the itemized statements hereto attached and made a part hereof, marked Exhibits 1

⁶ From form in record in Hoover v. Engles, 63 Neb. 688.

That a petition fails to allege that the action to recover personal taxes was brought by the direction or express authority of the board of county commissioners as is required by statute, is waived by the defendant failing to object to the petition on that ground. Moore v. Furnas Co. Live Stock Co., 78 Neb. 558.

⁷ Form in Bostick v. Board of County Comm'rs, 19 Okla. 92.

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to 35. Such lands were duly assessed for taxation for each of the years therein named, and the amounts set forth in the exhibits were thereafter duly levied upon, and together with the interest, are legally chargeable against the several parcels of real estate for the several years as therein set forth. Wherever an assessment for any public improvement is shown in the statement the amount therein stated was duly levied upon such parcel of real estate by the proper municipal authority and such proceedings were had with respect to such assessment and levy that all of the requirements of the statutes were met and complied with and the same is a valid and subsisting lien upon such real estate as described and shown herein. Each item of tax and special assessment shown in the petition and exhibits is delinquent and has not been paid or discharged except where an entry to that effect has been made herein.

The plaintiff as trustee for itself and the county of L. and the city of L., within such county, is the owner of and entitled to enforce the collection of the various taxes and special assessments, together with accumulated interest thereon, set forth in this petition and exhibits thereto attached and made a part hereof, and the several amounts shown therein to be unpaid, together with the docket fee, are now due.

The plaintiff therefore prays for a decree or decrees and findings in favor of the plaintiff, that the several taxes and assessments, together with the accumulated interest herein set forth, may be declared valid and that the several amounts thereof may be decreed and held to be liens upon such real estate, as provided by law, and that upon the establishment of such liens the parcels of real estate herein described and each of them which shall remain unredeemed, may be sold at public vendue to satisfy the decree or decrees so entered, together with the penalty and costs of this action as provided by law.⁸

⁸ From form in record in *State v. Several Parcels of Land*, 78 Neb. 581.

Form of petition to recover taxes alleged to have been illegally levied and collected. *Cass Co. v. C. B. & Q. Ry. Co.*, 25 Neb. 348.

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Form of petition to redeem land sold under void tax certificates. Sharp v. Brown, 34 Neb. 406.

An answer admitting that a certain certificate of tax sale set forth in full in the petition was sold, assigned and transferred to the plaintiff and that plaintiff "is now the holder of said certificate," followed by a general denial of the other allegations of the petition, amounts to an admission of the issuance and existence of the certificate so set forth. Battelle v. McIntosh, 62 Neb. 647.

Where the charter and the ordinances of a city require notice to be given to property owners for 30 days to designate material for paving, and notice is not given for the specified time and the city relies upon facts tending to show a waiver of the failure to give notice, it should plead the waiver in its answer, and no waiver having been pleaded the facts are outside of the issues in the case. Eddy v. Omaha, 72 Neb. 550.

EXTRAORDINARY WRITS.

CHAPTER CX.

HABEAS CORPUS.

- 960. Petition for habeas corpus where petitioner was held by sheriff under commitment for contempt for violating an injunction.
- 961. Petition for habeas corpus alleging illegal restraint by arrest.
- 962. Application for habeas corpus alleging illegal restraint and commitment by a notary public.
- 963. Return to writ of habeas corpus.
- 964. Writ of habeas corpus.

960. PETITION FOR HABEAS CORPUS WHERE PETITIONER WAS HELD BY SHERIFF UNDER COMMITMENT FOR CONTEMPT FOR VIOLATING AN INJUNCTION.

Comes now I. S. P. and shows to the court, first, that he is restrained of his liberty in the D. county jail, in the county of D. and State of Kansas, by L. W. H., the sheriff of said county; second, that the cause or pretense of his restraint, according to the best of the knowledge and belief of this petitioner, is as follows:

That on or about the day of, 19.., one E. A. P., the wife of this petitioner, filed her petition in the district court of D. county, Kansas, praying for a divorce from this petitioner as defendant, and prayed that this petitioner be restrained from interfering with the said E. A. P. or her property; that the probate judge of said county thereupon indorsed upon the said petition that the injunction as prayed for was allowed; that except the injunction granted by the probate judge of said county, as aforesaid, no injunction or restraining order has ever been granted in the said action, restraining or purporting to restrain this petitioner from interfering with said plaintiff or her property; that no bond for said injunction has ever been filed

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in the said action; that on the day of, 19.., an affidavit was filed by the said E. A. P., both of herself and her minor daughter, charging this petitioner with assaulting the said E. A. P. and the said minor daughter; that the said district court of D. county thereupon issued an order requiring this petitioner to appear upon the day of, 19.., and show cause why he should not be punished for contempt for violating said injunction; that the said court, on said day of, in the year aforesaid, did find this petitioner in contempt of said court, for having, as it was alleged, committed the said acts of violence, as hereinbefore stated; that the illegality of the restraint imposed upon this petitioner consists of—

1. Imprisonment of this petitioner by the sheriff of D. county for disobeying an injunction wholly void for the reason that the probate judge had no authority to grant the same, and no bond having been filed as required by law.

2. The acts alleged to have been committed were not in violation of the said injunction.

3. That the probate judge had not, nor had the district judge, any authority to restrain this petitioner, without bond, from doing anything else than disposing of the said E. A. P.'s property, or his own property.

4. That the alleged acts of violence committed by this petitioner were putting the said E. A. P. out of the room in which she was at the time assaulting this petitioner, without cause or provocation, and that this petitioner used no more force than was necessary in putting said E. A. P. out of the room.¹

¹ Form in *In re Pavey*, 52 Kan. 675.

Statutory provisions for issue of writ. Cob. Ann. Stat. Neb. sec. 2513; Comp. Laws Okla. 1909, sec. 6196; Gen. Stat. Kan. sec. 6283.

Application or petition. What it shall contain. Comp. Laws 1909, sec. 6197; Gen. Stat. Kan. 1909, sec. 6285.

A petition for a writ of habeas corpus must state the facts which constitute the illegal restraint. It is not sufficient to allege that the petitioner is illegally restrained of his liberty. *State ex rel. v. Ensign*, 13 Neb. 250. *Ex parte Nye*, 8 Kan. 75.

A petition based on alleged want of probable cause for arrest

HABEAS CORPUS.

961. PETITION FOR HABEAS CORPUS ALLEGING ILLEGAL RESTRAINT BY ARREST.

The petition of M. E. L. respectfully shows that he is unlawfully imprisoned, detained, confined and restrained of his liberty by H. C. L., chief of police of the city of T., and E. W., keeper and jailer of the city prison of said city, should set out all the testimony taken before the examining magistrate. *Rhea v. State*, 61 Neb. 15.

Where the petition fails to set out any warrant or order of commitment, but states facts by which it can be reasonably inferred that the defendant had no such warrant this will excuse the failure to set out a copy of any process. *Urban v. Brailey*, 85 Neb. 796.

Scope of writ discussed and right to relief under it. *In re Patswald*, 5 Okla. 789.

Writ will lie to relieve from a void sentence where the court had no jurisdiction. *In re McVey*, 50 Neb. 481; *In re Norton*, 64 Kan. 842; *In re Smith*, 2 Okla. 153; *In re Seagraves*, 4 Okla. 422; *In re Wright*, 74 Kan. 409.

The third clause of section 671 of the code of civil procedure of Kan. which relates to procedure in habeas corpus, and which forbids the discharge, upon such proceedings, of one held for contempt, does not apply to the case of one so held where the order under which he is being held was made without jurisdiction. In such case the jurisdiction of the court to make such order may be inquired into. *In re E. B. Jewett*, 69 Kan. 830.

Writ will lie to relieve from arrest and detention for the violation of the provisions of a void ordinance. *In re McMonies*, 75 Neb. 702; *In re Gribben*, 5 Okla. 379.

Writ will lie to relieve from restraint under an absolutely void judgment. *Michaelson v. Beemer*, 72 Neb. 761; *In re Patswald*, 5 Okla. 789; *In re Harlan*, 1 Okla. 48.

But not where proceedings are merely voidable or irregular. *Keller v. Davis*, 69 Neb. 494; *In re Walker*, 61 Neb. 803; *In re Black*, 52 Kan. 64; *In re White*, 50 Kan. 299; *In re Nolan*, 68 Kan. 796.

Writ may issue to another county of the state outside of the judicial district of the judge when the right of personal liberty makes it necessary. *State ex rel. v. Porter*, 78 Neb. 811.

The remedy sought in a proceeding in habeas corpus is a civil one, and, hence, judges of district courts have no power to direct the issuance of the writ to a person outside of their districts, commanding him to bring into their districts the body of one detained outside thereof. *In re Jewett*, 69 Kan. 830.

Void proceedings not irregularities in before a justice of peace where person has been committed can only be reviewed by habeas corpus. *In re Hammond*, 83 Neb. 636.

The regularity of the proceedings leading up to the sentence in a

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in S. county, in this state, at the city jail in the city of T., in the county of S., Kansas; that the imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to-wit: That the only pretext or cause of such arrest and detention is by virtue of a warrant of arrest issued out of the police court of the said city, upon a complaint charging the petitioner with the alleged

criminal case cannot be inquired into on an application for a writ of habeas corpus. *McCarthy v. Hopkins*, 61 Neb. 550; *In re Ream*, 54 Neb. 667; *In re Havlik*, 45 Neb. 747; *In re Corum*, 62 Kan. 271.

Writ of habeas corpus will not issue because of mere insufficiency of complaint in a criminal proceeding, if by any possible construction of the language employed therein an offense against the law is thereby even defectively stated. *In re Caldwell*, 82 Neb. 544; *Rhyn v. McDonald*, 82 Neb. 552; *State ex rel. v. Shrader*, 73 Neb. 618.

Will not lie to inquire into the legality of a warrant or commitment issued from a court of competent jurisdiction before final trial and judgment. *In re Terry*, 71 Kan. 362.

Will not lie to discharge a person indicted for a crime until after such person has applied to the trial court for relief. *In re Dykes and Baker*, 13 Okla. 339.

Will not lie where the petitioner has an adequate remedy by appeal. *In re Maas*, 10 Okla. 302; *In re LeRoy*, 3 Okla. 322.

Will not lie to release a prisoner because the jail in which he is confined is in bad condition and alleged to be an unfit place for prisoners. *In re Ellis*, 76 Kan. 368.

Will not issue from the supreme court of Oklahoma to the warden of the penitentiary of the State of Kansas to inquire into the validity of a sentence of a person confined there. *In re Bailey*, 10 Okla. 294.

Will lie only to discharge a person who is under physical restraint. *In re Dykes & Baker*, 13 Okla. 339.

Will lie to discharge one imprisoned in a bastardy proceeding, for failure to give bond for payment of the judgment. *In re Comstock*, 10 Okla. 299.

There is no provision of law for the filing of a motion for a new trial in a habeas corpus proceeding in a county court. *State ex rel. v. Shrader*, 73 Neb. 618.

In an application for a writ of habeas corpus the court having jurisdiction of the proceedings may examine the judgment or commitment of another court under which the person is restrained of his liberty and if it appears and the record shows that the court rendering the judgment was without authority to render it, or if the charge on which he was convicted does not constitute an offense for which punishment can be inflicted or the court exceeded its authority a prisoner may be discharged. *In re Dill*, 32 Kan. 668.

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violation of a pretended ordinance of the city of T., No., copies of such warrant, complaint and ordinance are hereto attached, marked exhibits "A," "B" and "C" respectively; and that the said pretended ordinance is null and void in this, to-wit: In attempting to create the office of city scavenger, for which there is no authority of law, and in giving the mayor authority to appoint a city scavenger, which is not provided for by law; in attempting to absolutely prohibit any person or persons from engaging in the business of a scavenger, unless appointed by the mayor and approved by the council; in attempting to break up the business of this petitioner, in which he has invested a large sum of money, and has been engaged in for several years; and for the further reason the ordinance is in derogation of the vested rights of this petitioner, under a contract entered into between himself and the city of T. in, 19., and which is now existing, in full force and effect, a copy of which contract is hereto attached, marked exhibit D, and made a part of this petition.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted, directed to the said H. C. L. and E. W., commanding them to have the body of this petitioner before the supreme court, at a time and place therein to be specified, to do and receive what shall then and there be considered by your honors concerning him, together with the time and cause of this detention and said writ; and that your petitioner may be restored to his liberty.²

962. APPLICATION FOR HABEAS CORPUS ALLEGING ILLEGAL RESTRAINT AND COMMITMENT BY A NOTARY PUBLIC.

Your petitioner, C. W. D., is unlawfully imprisoned, detained, confined and restrained of his liberty by J. F., sheriff of S. county, Kansas, at W., in the county of S., State of Kansas; that said imprisonment, detention, confinement and restraint are illegal, in this, to-wit, that the petitioner heretofore brought four suits against the St. L. & S. F. Ry. Co., and the same are all at issue and pending in the United

² Form in *In re Lowe*, 54 Kan. 757.

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States circuit court within and for the district of Kansas, and are assigned for trial at the coming term of said court; that in said causes so pending the defendant took the deposition of your petitioner at P., Kansas, one week ago, to-wit: , 19..; that on , 19.., at o'clock p. m., the attorney of your petitioner received a telegram in F. S., Kansas, of which a copy is hereto attached, marked "exhibit A" and made a part hereof; that your petitioner received no other notice, nor did any of his attorneys receive any other notice except that petitioner received a so-called subpoena on , 19... A copy of said so-called subpoena is hereto attached, marked "exhibit B," and made a part hereof; that afterward, about o'clock a. m. of said , 19.., an attachment was issued by one A. T. O. directed to J. F., sheriff of said county; said O. was a notary public, duly commissioned under and by virtue of the laws of the State of Kansas.

Under said writ of attachment the said sheriff attached the petitioner and brought him into the presence of the said O. A copy of the said writ, with all indorsements, is hereto attached, marked "exhibit C" and made a part hereof. At this point of time the petitioner served upon the defendant's attorney a notice, of which "exhibit A" hereto attached and made a part hereof is a true copy. Since which time said defendant has served notice upon your petitioner that it will take your petitioner's deposition at S., Mo., on , 19.., together with that of other witnesses. Thereupon the defendant caused to be served upon your petitioner a so-called subpoena in the presence of the notary, the same being signed and sealed by said notary. Said subpoena is hereto attached, marked "exhibit E" and made a part hereof. Thereupon said notary, at the request of the attorney of said defendant, ordered the petitioner to stand up and be sworn, and your petitioner refused. Your petitioner objected to the jurisdiction of said notary. Thereupon said notary issued a writ of commitment to the sheriff of said county, directing him to commit your petitioner to the com-

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mon jail of said county, and to keep him there confined. A copy of said writ is hereto attached, marked "exhibit F" and made a part hereof. Under said writ the said sheriff of S. county, Kansas, then took possession of the body of your petitioner and has him now in custody.

Your petitioner says that such custody and confinement are unlawful by the sheriff of said county, and is furthered against your petitioner oppressively by said defendant, not for the purpose of obtaining a deposition that said defendant intends to offer in evidence on its own behalf, but for the purpose of fishing out the plaintiff's evidence.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted, directed to the said J. F., commanding him to have the body of your petitioner before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of his detention and said writ, and that he may be restored to his liberty.³

963. RETURN TO WRIT OF HABEAS CORPUS.

Now come H. V. S. B. and J. H. H., respondents herein, and for their return to the writ issued herein, say that, in obedience to its requirements, they have before the court the said T. B.

³ Form in *In re Davis*, 38 Kan. 408.

Form of application for writ by petitioner alleging that he is illegally restrained of his liberty by reason of illegal trial and conviction. *In re Dossett*, 2 Okla. 369, 370.

Form of petition for habeas corpus alleging illegal restraint in the state penitentiary. *In re Fuller*, 34 Neb. 581.

Form of petition for habeas corpus for the custody of a child. *Bleakley v. Barclay*, 75 Kan. 462.

Form of petition, return and traverse in habeas corpus proceedings. *In re Gunn*, 50 Kan. 155.

Form of petition for writ of alleging illegal restraint of defendant by the sheriff. *In re Donnelly*, 30 Kan. 191.

Form of application for writ by one committed by notary public for refusal to be sworn and give his deposition. *Dogge v. State*, 21 Neb. 272.

Form of application for writ by one committed by justice for violation of liquor law. *In re White*, 33 Neb. 812.

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They further state that said H. V. S. B. is the father and natural guardian of said T. B.; that said H. V. S. B. and the petitioner, at the time of their separation, mutually agreed that said father should have the custody, care and nurture and education of said boy; that said boy was by said father placed in charge of Mrs. J. H. H., the sister of said H. V. S. B., and wife of J. H. H.; that said father has not neglected said boy, and said boy is receiving the kindest and best of treatment, and his moral and mental welfare is carefully nurtured, educated, and guarded; that the district court of G. county, Kansas, in the decree divorcing said H. V. S. B. from the petitioner, in accordance with the agreement of said parties, gave said father the custody of T. Respondents deny all the allegations of the petition herein material thereto, not herein admitted or otherwise stated. Respondents further say, that on the day of, 19.., petitioner filed in said divorce action a motion to vacate the order granting the plaintiff therein (H. V. S. B.) the custody of said child, and modifying same so that petitioner herein should have his custody (a duly certified copy of said motion is hereto attached, and made a part hereof, marked "exhibit A"); that on the day of, 19.., said motion came on for hearing before said district court, and was by judgment of said court denied (a copy of said judgment, duly certified to, is hereto attached, marked "exhibit B"). The respondents further say, that petitioner and her husband are not fit persons to intrust with the care, custody and education of said child.

Wherefore respondents pray that the petition be dismissed, and that they have judgment for costs herein expended, and for all proper relief.⁴

⁴ Form in *In re Freeman*, 54 Kan. 493-494.

Where the defendant makes his return to the writ alleging that he holds the plaintiff for and by virtue of a process held by another person, a copy of such process should be set out in or attached to his return in order to show by what authority he restrains the plaintiff, or a sufficient reason assigned for not doing so. *Urban v. Brailley*, 85 Neb. 796.

It is not necessary that the return to the writ of habeas corpus shall contain a denial of the averments[•] of the application for the writ, nor

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964. WRIT OF HABEAS CORPUS.

County of }
State of, } ss.

By the Habeas Corpus Act.

The State of to E. F. (the one having custody of the petitioner), Greeting:

You are hereby commanded that the body of C. D. under your custody detained (if the prisoner be in jail also allege this fact) as it is said, under safe and secure conduct, together with the time and cause of his imprisonment and detention, by whatsoever name the said C. D. may be known, you have before judge of the court within the county, at the courthouse in on the day of, 19.. (or forthwith), then and there to be dealt with according to law, and have you then and there this writ, and hereof fail not at your peril.

Witness judge of the court within county and the seal of said court affixed thereto this day of, 19...

....., Clerk, etc.⁵

anything more than is prescribed by section 668 of the civil code; and where a return is made in compliance with the code, and the petitioner desires to controvert the return or allege any new matter showing the restraint to be illegal, he may do so by an appropriate pleading, and thereby an issue as to the facts may be raised. In re Chipchase, 56 Kan. 357.

Form of return of sheriff to petition for writ. In re Jourdan, 54 Kan. 496.

⁵ **Statutory form of writ when the prisoner is not in the custody of an officer.** Cob. Ann. Stat. Neb. 1911, sec. 2527.

CHAPTER CXI.

MANDAMUS.

- 965. Petition for mandamus—Skeleton form.
- 966. Petition for mandamus against board of county commissioners.
- 967. Application for writ of mandamus to compel the district court to recognize relator as clerk and to deliver to him records of that office.
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965. PETITION FOR MANDAMUS—SKELETON FORM.

In the Court, etc.

In the matter of C. D. Petition for Mandamus.
ex parte.

To the court within the county of :

The petition of C. D. respectfully alleges: (state facts specifically showing that the petitioner is entitled to mandamus against the officer refusing to perform the duty and that the petitioner has no other adequate remedy, etc.).

Wherefore your petitioner prays this court to award against (the officer or officers required to perform the duty)

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a writ of mandamus commanding the said (name of officer or officers) to (state precise duty to be performed) and for such other process, order or judgment as may be proper.¹

¹ **Statutory provisions** as to issue of writ. Cob. Ann. Stat. Neb. 1911, sec. 1657 *et seq.*; Comp. Laws Okla. 1909, sec. 6224 *et seq.*; Gen. Stat. Kan. 1909, sec. 6310.

The petition for mandamus must state all the essential facts necessary to entitle the party to the relief sought. And where the payment of money by a public officer is the object in view, it must distinctly appear that there is a fund from which the desired payment can legally be made. *State ex rel. v. Board of Otoe County Com'rs*, 10 Neb. 19.

The application must show a prior demand and refusal, and must set forth facts which clearly impose upon the respondent a duty which the law enjoins upon him as resulting from an office, trust, or station. *Kemerer v. State ex rel.*, 7 Neb. 130.

The relator in a mandamus proceeding must charge directly all facts necessary to entitle him to the writ. Inferences in his favor will not be drawn from vague or ambiguous language. *State ex rel. v. Home Street R. Co.*, 43 Neb. 830.

A petition for a peremptory writ of mandamus directed to the state auditor, requiring him to register refunding bonds issued by a county, and certify thereon that such bonds have been regularly and legally issued and registered in accordance with law, will be held defective in substance, on a ruling on a demurrer thereto, where it is not made to appear from the allegations therein contained that there has been filed in the office of the auditor the necessary information and data relative to the issuance of such bonds, from which it may be inferred that they were issued by authority and in pursuance of a valid statute, and that the statutory requirements to entitle them to registration have been complied with. *State ex rel. v. Weston*, 67 Neb. 175.

Petition upheld as against a demurrer based on the ground that several causes of action are improperly joined. *State ex rel. v. Harbison*, 64 Kan. 295.

The difference between the proceeding at common law by mandamus and the action of mandamus under the code, stated and discussed in the opinion. *State ex rel. v. County of Jefferson*, 11 Kan. (66) 60.

Such damages as the plaintiff has actually sustained through the wrong doing of defendants may be recovered where judgment is rendered in his favor. *McClure v. Scates*, 64 Kan. 282.

Probate courts have no jurisdiction to hear and determine original proceedings in mandamus, and issue writs therein. *Starkweather v. Kemp*, 18 Okla. 28.

Will not issue when there is an adequate remedy at law. Cob. Ann. Stat. Neb. 1911, sec. 1662; Gen. Stat. Kan. 1909, sec. 6311; Comp. Laws Okla. 1909, sec. 6225; *Horton v. State ex rel.*, 60 Neb. 701; *Arends v.*

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998. PETITION FOR MANDAMUS AGAINST BOARD OF COUNTY COMMISSIONERS.

Now come the plaintiffs, T. W. P., J. N. M., and O. C., and show to the court and aver that on the day of, 19.., said defendant, B. F. S., G. W. W. and J. H.

Kansas City, 57 Kan. 350; State ex rel. v. McCrillus, 4 Kan. 214; State ex rel. v. Houseworth, 63 Neb. 658.

The granting of a writ of mandamus rests largely in the sound discretion of the court, and where it is asked to enforce the performance of a duty to the public, the interests of all the people concerned will be regarded, and the writ will be so framed as will best preserve and enforce the rights of all parties. Potwin Place v. Topeka Ry. Co., 51 Kan. 609.

Mandamus should not issue where the record shows the injustice of plaintiff's claim. Stearns v. Sims, 24 Okla. 623.

It is a remedy to compel the performance of a duty required by law, where the party seeking the relief has no other legal remedy and the duty sought to be enforced is clear and indisputable. Both requisites must concur in every case. Territory of Oklahoma v. Crum, 13 Okla. 9.

The only purpose of a writ of mandamus is to require the person to whom it is issued to perform some act which the law enjoins as a duty. Sharpless v. Buckles, 65 Kan. 838.

Mandamus lies to require a court to exercise its lawful jurisdiction, but not to coerce a particular judgment or to rectify an erroneous one. Winfrey v. Benton, 25 Okla. 445.

Will lie to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. State ex rel. Stevenson v. McMillan, 21 Okla. 384; State ex rel. Stevenson v. Russell, 21 Okla. 58; Riley v. Garfield Tp., 54 Kan. 463.

Will lie in a proper case to compel fixing the amount of the penalty of a supersedeas bond to be given on appeal from an order confirming the sale of real estate. State ex rel. v. Fawcett, 60 Neb. 393.

Will lie to restore to his office a superintendent of an insane asylum from which he has been arbitrarily and wrongfully removed. Eastman v. Householder, 54 Kan. 63.

Mandamus will lie to compel a public officer whose term has expired to perform an act which he should have done while in office where it is in its nature capable of such subsequent performance and a public purpose is to be served thereby. State ex rel. v. Prather, 84 Kan. 169.

Mandamus will not lie to try title to a public office. State ex rel. v. Quinn, 86 Neb. 758; State ex rel. v. Haverly, 62 Neb. 767; State ex rel. v. Plambeck, 36 Neb. 401; Cameron v. Parker, 2 Okla. 277.

Yet sufficient investigation may be made in such a proceeding to ascertain whether the relator has a *prima facie* title to the office in question. Cruse v. State ex rel., 52 Neb. 831.

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W., were the duly elected, commissioned, qualified and acting members of and constituting the board of county commissioners of F. county, Kansas, and that said board was then and there in G. C., in said county and state, in session at its regular meeting; that then and there on said day there was presented to said board of county commissioners a petition signed by a majority of the electors of the incorporated town or village of L. C., in W. county, State of Kansas, setting forth the metes and bounds of their town, village and commons, and stating that the number of the inhabitants of said town and village was, and praying that said town or village be incorporated as a city of the third class; with said petition, filing and presenting to said board the duly-verified affidavit of J. F. W., one of the publishers of the L. L., a weekly newspaper published and printed at L. C. aforesaid, that said petition had been published in said newspaper at least once in each week for three consecutive weeks, to-wit, on, 19.., ...

It may aid in obtaining possession of the books, records, and official belongings of a public office. *Cameron v. Parker*, 2 Okla. 277.

Will not lie where the relator has no interest in the action, nor where the duty sought to be enforced by the writ is a matter in the discretion of the respondents. *State ex rel. v. Board of Commissioners*, 4 Kan. 223.

Will not lie at the instance of a private citizen to compel the performance of a purely public duty. Such a suit must be brought in the name of the state. *Bobbett v. State*, 10 Kan. 17.

Will not lie to compel an officer or a board of canvassers to do an act which, without its command, it would not have been lawful for the officer or board to do. *Rosenthal v. State Board of Canvassers*, 50 Kan. 129.

Will not issue to compel a probate judge to fix the amount of or approve an appeal bond for an appeal from an order removing the guardian of an insane person, where no notice of an appeal is given, nor affidavit required by the statute is filed. *McClun v. Glasgow*, 55 Kan. 182.

Will not lie to revise judicial action. *St. Louis and San Francisco R. R. Co. v. Shinn*, 60 Kan. 111.

Will not lie to compel the governor of the state to perform a duty not strictly ministerial. *Householder v. Morrill*, 55 Kan. 317.

Obligations arising upon contract merely, and involving no trust, cannot be enforced by mandamus. *State v. Republican River Bridge Co.*, 20 Kan. 404.

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....., 19.., and, 19..; that said board of county commissioners was satisfied on all points and requirements as set forth in sections 1 and 2, Chap., Laws of Kansas, ..., but that said board of county commissioners wrongfully, and without right refused to receive and act upon said petition and to grant the prayer thereof, on the sole ground that W. county, an unorganized county of the State of Kansas, was not attached to F. county for judicial purposes.

Plaintiffs further aver that at the regular session, 19.., of said board, said county of W. was organized as a municipal township of F. county; that F. county for the two years last past (said county being situated within the judicial district of the state) was the only organized county adjoining W. county, and was such at and during the last session of the legislature of the State of Kansas; that said judicial district was the most convenient judicial district to W. county; that W. county has been and is attached to F. county for judicial purposes, since, 19.., and prior thereto; that it was the duty of said defendants as such board to receive and act upon said petition, and to grant said petition, and the performance of which the law specially enjoined on them as a duty, by virtue of their office, trust and station.

Wherefore, said plaintiffs ask the court to grant, issue and award a peremptory writ of mandamus to said board of county commissioners, compelling and commanding said board to receive and act upon said petition, and to grant the prayer thereof, and make the proper order, declaring said town or village of L. C. incorporated as a city of the third class, by the name and style of "The city of L. C." and designating in said order the metes and bounds thereof; also, to incorporate in said order an order ordering the first election in said city for city officers, designating the place where said election shall be held, and appointing three qualified electors of said city to act as judges of said election, and two other electors of said city to act as clerks, and three other electors of said city to act as a board of canvassers of

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said election returns; and to forthwith enter said order at length on the journal of the proceedings of said board of county commissioners, and cause the same to be published once in some newspaper printed in said city, at least one week before said city election; and for all other and proper relief.²

967. APPLICATION FOR WRIT OF MANDAMUS TO COMPEL THE DISTRICT COURT TO RECOGNIZE RELATOR AS CLERK AND TO DELIVER TO HIM RECORDS OF THAT OFFICE.

Comes now plaintiff T. M. and represents and shows to this court that at the general election held in the State of O. on the day of, 19.., he was duly elected to the office of district clerk of the county of N., State of O., having received a majority of the votes of said county cast at said election for said office; that he has since received his certificate of election from the clerk of said county, and has taken the oath of office and given the bond required by law; that on the day of, 19.., in a mandamus proceeding in the United States court for the W. district of I. T. at M. in which C. B. et al. were plaintiffs and the county commissioners of said county of M. were defendants, which was a proceeding to require said defendants as such commissioners to canvass the vote of said county for all county offices of said county, said court rendered judgment against said plaintiffs and in favor of said defendants by then and there discharging the rule and dismissing said cause upon said defendants, response in obedience to the terms of the alternative writ of mandamus issued by said court in which response said defendants stated that they had canvassed the vote of said county; that said commissioners found by canvassing the vote of said county that your petitioner had been duly elected to the office of district clerk of said county and the certificate issued by the district clerk of said county to your petitioner was in obedience to the canvass of said commissioners; that there has been no appeal taken from the judgment of said court; that said court had jurisdiction

² Form in *Pelham v. Board of Commissioners of Finney County*, 36 Kan. 101.

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to determine the question of petitioner's right to said office and that said judgment was in favor of your petitioner. That having qualified as required by law and as above stated, to-wit, on the day of, 19.., your petitioner entered upon the discharge of his duties as such district clerk and has remained in the active discharge of said duties up to this time; that the records belonging to his office as district clerk of said county are in the control and custody of J. H. K., judge of the judicial district of the State of O., which district is composed of counties of M. and W. in this state; that on the day of, 19.., your petitioner presented to the said J. H. K., sitting as a court at M., in said county, his petition in writing stating that he was the duly elected clerk of said court; that he had qualified as such and requested said court to turn over to him as such clerk the records and papers which properly belonged to him as clerk of said court. And he further states that said court refused to recognize your petitioner as such clerk and refused to turn over to him any of the papers or records which belong to him as clerk of said court. That the said C. S. B. has no legal right to hold said office and is a usurper. And plaintiff further states that he is remediless in the premises by or through ordinary process or proceeding at law and he therefore prays this honorable court to award against the district court a writ of mandamus commanding it to recognize your petitioner as the district clerk of said court and to vacate all orders heretofore made inconsistent therewith and to turn over to your petitioner all papers and records which legally belong to him and such other process and orders and remedies as may to the court seem meet.

(Affidavit.)³

968. APPLICATION FOR PEREMPTORY WRIT OF MANDAMUS.

Comes now the said plaintiff and respectfully represents and shows to the court:

That he is now, and was at all times hereinafter mentioned, the duly qualified and acting sheriff of O. county, State of Oklahoma.

³ Form in *Matney v. King*, 20 Okla. 22.

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That the said defendant is now, and was at the times hereinafter specified, the duly qualified and acting auditor of State of Oklahoma.

That it is the duty of said defendant, under the laws of said state, to audit all claims and accounts against the state, when properly presented and verified, and to issue warrants on the state treasurer for the amounts thereof.

That on the day of, 19.., in executing a warrant duly and regularly issued, directed and delivered to the plaintiff as sheriff of O. county, the plaintiff conducted one W. E. M., duly adjudged insane, to the insane hospital at J., Ill., as directed in said warrant and delivered said W. E. M. to the superintendent of said hospital, whose receipt for said patient was duly endorsed on said warrant; that in executing the warrant as aforesaid, the plaintiff incurred expense in railroad fare, etc., amounting to dollars; that said expenses are a proper charge against said state, and said State of Oklahoma is liable to plaintiff for the same; that plaintiff made out an itemized statement of his account in due form, a copy of which is hereto attached, marked "exhibit A" and made a part hereof, and presented to the defendant, as auditor, and requested that the same be audited, and a warrant issued to him on the treasurer for the same; that the defendant refused and still refuses to audit said account and to issue a warrant to plaintiff therefor.

That on the day of, 19.., the plaintiff, in executing a warrant duly directed and delivered to him as sheriff of O. county, conducted E. R., an insane patient, to the hospital at J., Ill., and delivered said patient to the superintendent of said hospital, as in said warrant directed, and in so doing incurred an expense for railroad fare, board, etc., amounting to dollars, an itemized statement of said account is hereto attached, marked "exhibit B" and made a part hereof; that said expense is a proper charge against the State of Oklahoma; that the plaintiff presented said accounts to the defendant, as auditor, and requested that he audit said accounts and issue a warrant to plaintiff on

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the state treasurer for the amount thereof; that the defendant refused and still refuses so to do.

That the plaintiff paid out the greater amount of said money in cash, and expected said account to be properly audited and warrant issued therefor, so that the same could be converted into money, and that said accounts were not audited and warrants issued therefor, is the source of much embarrassment to him in the proper conduct of his office; that he has no adequate remedy at law, and that unless the writ issue as hereinafter prayed for, great and irreparable wrong will be done him.

Wherefore, plaintiff prays that a peremptory writ of mandamus issue forthwith, directed to the defendant, commanding him to audit the said accounts and issue and deliver to plaintiff warrants on the state treasurer for the respective amounts thereof, as in duty bound he will ever pray.⁴

969. PETITION FOR MANDAMUS TO COMPEL RAILROAD COMPANY TO FURNISH FREIGHT CARS.

The relator, W. L., for cause of action alleges that he now is and for more than one year last past has been engaged in the production, shipment, purchase and sale of hay at E., in H. county, and is still engaged in that business.

2. That for several years last past the respondent has owned and operated, and still owns and operates a railroad from E., Nebraska, to O. and L. in this state. That during said years it has been and still is a public service corporation and a common carrier for hire, and it is now operating said railroad.

3. That relator now has more than car-loads of baled hay at E. station on the respondent's road which he desires to ship to O. and he now owns and has in stack at least tons of hay in the vicinity of said E. station and which hay he also desires to bale and ship over the respondent's railroad. That ever since the of he has been demanding cars from respondent in which to ship part of his hay. That on the day of

⁴ Adapted from form in *Johnson v. Cameron*, 2 Okla. 266.

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19.., he served a written notice on the respondent demanding that it furnish him immediately cars at E. in which to ship hay to O., and further demanded of it one car per day until the day of, 19... That he necessarily needs and must have in order to carry on his business and ship his hay, ... cars immediately and one car per day thereafter until the day of, 19.., and which hay he desires to ship and will ship over the respondent's railroad to O. and L. aforesaid. That he is entitled to said cars and has duly demanded the same and the respondent has failed and refused and still refuses to furnish said cars. That it is the duty of respondent to furnish him all of said cars. That his hay which is baled at E. is subject to injury by the elements. That he has an opportunity to sell the same at a profit and the market is liable to decline any day. That his hay in the vicinity of E. generally is in stacks and subject to injury by the elements and likewise subject to destruction by fire. That during the time when respondent has refused to furnish him cars in which to ship his hay it has been furnishing to others on its line of railroad cars in which to ship hay, cattle, horses, grain and other products and has been discriminating against this relator and is still discriminating against him.

The relator therefore prays that the court may award him a peremptory writ of mandamus herein compelling the respondent forthwith to furnish him cars at its station at E., Nebraska, in which to ship hay to O. and thereafter one car each day until the day of, 19.., in which to ship hay over the respondent's railroad from E., Nebraska, to O. and L. in said state and he further prays that he may recover his costs herein.⁵

⁵ From form in record in State ex rel. v. C. & N. W. Ry. Co., 83 Neb. 524.

Form of petition to compel railway company to construct a crossing. State ex rel. Lancaster Co. v. C. B. & Q. R. Co., 29 Neb. 414.

Form of petition for writ of mandamus to compel the auditor of the Territory of Oklahoma to register certain refunding bonds. Territory of Oklahoma ex rel. v. Hopkins, 9 Okla. 133, 135.

EXTRAORDINARY WRITS.

970. THE ENDORSEMENT OF THE WRIT AFTER IT IS AWARDED.

State of at the relation of C. D. }
vs. } **Mandamus.⁶**
E. F. }

Form of petition to compel the register of certain bonds issued by a city. State ex rel. v. Babcock, 23 Neb. 179.

Form of petition to compel a canvassing board to canvass the returns of an election. State ex rel. v. Howe, 28 Neb. 618.

Form of petition in action to compel the mayor and council to accept a waterworks system. State ex rel. v. Mayor and Council, 32 Neb. 568.

Form of application for mandamus to compel superintendent of county to make levy for maintaining high schools. School District No. 32 v. Wilson County, 82 Kan. 806.

Form of petition to compel county clerk to refund surplus fees. State ex rel. v. Shearer, 29 Neb. 477.

Form of petition in action to compel commissioners to canvass votes cast at an election. Lynch v. State ex rel., 30 Neb. 740.

Form of petition to compel clerk of court to pay over to the relator certain moneys in his hands. State ex rel. v. Spicer, 36 Neb. 469.

Form of petition to compel county officers to approve a bond. State ex rel. v. Field, 26 Neb. 393.

Form of allegations in petition to compel clerk of court to issue execution on a judgment. State ex rel. v. Sheldon, 26 Neb. 151.

Form of petition in an action against a city to compel the revocation of an alleged illegal liquor license. State ex rel. v. South Omaha, 33 Neb. 876.

⁶ **The action may be brought in the name of the state on the relation of the county judge, or any other proper party.** David, County Judge, v. Caruthers, District Judge, 22 Okla. 323.

A relator having a personal right to be enforced by mandamus may bring an action in the name of the state on his relation. State ex rel. v. Spicer, 36 Neb. 469.

The action of mandamus should be brought and prosecuted in the name of the party in interest, as plaintiff, and not in the name of the state. State ex rel. v. Marston, 6 Kan. 315.

A private individual, not shown to be either a citizen or to be beneficially interested in the enforcement of the laws, cannot invoke mandamus to compel an officer to perform a public duty. State ex rel. v. Osborn, 60 Neb. 415.

It is the better practice to issue the writ of mandamus in the name of the state on the relation of the party or parties interested, although such writ may issue in the name of such party under the code provision requiring the real party in interest to sue. Thompson v. State ex rel. Cooksey, 25 Okla. 741.

It is proper to make persons defendants from whom the performance

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971. VERIFICATION OF PETITION FOR MANDAMUS.

State of, {
County of } ss.

Before me, the undersigned authority, this day personally appeared E. W. J., who, upon his oath, states that he has read and examined the foregoing motion and application for mandamus and that the allegations therein contained are within his knowledge and are true.

E. W. J.

Subscribed and sworn to, etc.⁷

972. SAME—ANOTHER FORM.

State of, {
County of } ss.

T. M. of lawful age being duly sworn, says that he is the plaintiff above named. That he has read the foregoing petition and knows the contents thereof; that the facts therein set out are true.

T. M.

Subscribed and sworn to, etc.⁸

of no duty is sought, but who might be affected by the judgment. *State ex rel. v. Dolley*, 82 Kan. 533.

⁷ Form in *Territory ex rel. v. Hopkins*, 9 Okla. 133.

Application for writ must be verified. *Cob. Ann. Stat. Neb.* 1911, sec. 1665; *Comp. Laws Okla.* 1909, sec. 6228; *Gen. Stat. Kan.* 1909, sec. 6314.

An affidavit made by an attorney for the party applying for the writ that the facts stated in the application are within his personal knowledge, states a sufficient reason why the attorney makes it. *Pallady v. Beatty*, 15 Okla. 626.

The affidavit in support of a motion for a writ of mandamus, must be sworn to positively and not merely upon information and belief. Verification upon information and belief in such a case, is an informality which may be cured by an amendment under section 653 Code of Civil Procedure. Where an application for a writ of mandamus by a public corporation is defectively verified by one of the officers of the corporation, an affidavit of another officer thereof, testifying positively to the essential facts alleged, may be treated as an amendment, within the meaning of said section. *Steidl v. State ex rel.*, 63 Neb. 695.

⁸ Form in *Matney v. King*, 20 Okla. 22.

EXTRAORDINARY WRITS.

973. NOTICE OF APPLICATION.

To E. F.:

Take notice: That on the day of, 19.., or as soon thereafter as I can be heard, I will apply to the court within the county, State of, for a writ of mandamus to issue against you requiring you to (state relief prayed in petition). C. D.

By, his attorney.⁹

974. ALTERNATIVE WRIT.

The State of, to E. F. (give name of officer, his title, etc.), Greeting:

Whereas, it appears to this court by the petition of C. D. on file in the office of the clerk of our said court that (state all facts which constitute the wrong for which redress is sought, as it is essential that the writ should state a cause of action) and nevertheless you have refused illegally (state omitted duty) to the injury of the said C. D. as appears by said petition.

Now, therefore, we, being willing that full and speedy justice should be done in this behalf to him, the said C. D., do command and enjoin you that immediately after the receipt of this writ you (state what act or acts are to be performed), or that you appear and show cause to the contrary before our court within the county, at the city (or town) of on the day of, 19.., at o'clock .. M., or as soon thereafter as counsel can be heard. Herein fail not at your peril, and have you then and there this writ and make due return of your execution of the same.

Witness, ... judge court, within county and the seal of said court hereto affixed, this day of, 19...

L. S.

....., Clerk.¹⁰

⁹ Notice may be required to adverse party. Cob. Ann. Stat. Neb. 1911, sec. 1665; Comp. Laws Okla. 1909, sec. 6228; Gen. Stat. Kan. 1909, sec. 6314.

¹⁰ An alternative writ of mandamus must contain a statement of

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975. SAME—ANOTHER FORM.

Whereas, an application for a mandamus to each of the above-named defendants, duly verified, has been presented to the undersigned, a judge of the supreme court of the State of Kansas, by which it is made to appear that at an

all the facts necessary to justify the order sought for by the proceeding, and omissions in the alternative writ cannot be supplied by the affidavit or application. *State ex rel. v. School District No. 9*, 8 Neb. 92.

Issuance of a new alternative writ in mandamus proceedings, for the purpose of amendment under section 653, Code of Civil Procedure, does not amount to the commencement of a new action. *Kas v. State ex rel.*, 63 Neb. 581.

When it is sought to enforce by mandamus the performance of a public duty by an officer of the county, which is coupled with the expenditure of the general fund of the county, the alternative writ ought to allege that there was sufficient money belonging to the particular fund which could legally be appropriated to the purpose. *Board of Commissioners v. State*, 42 Kan. 327.

The writ of mandamus, whether alternative or peremptory, must not only show the obligation of the defendant to perform the act, but must also show his omission to perform it. *Rosenthal v. State Board of Canvassers*, 50 Kan. 129.

Writ and answer the only pleadings. *Cob. Ann. Stat. Neb. 1911*, sec. 1669.

The only pleadings allowed are the plaintiff's writ and the defendant's answer. The defendant cannot, therefore, by cross-action in the same suit, have a writ to compel the performance of some act by the plaintiff. *Leavenworth v. Leavenworth Water Co.*, 62 Kan. 643.

The application for the writ and the answer are the only pleadings allowed in application for mandamus, and if the respondent file a demurrer and the same be overruled, the writ will issue, and no further pleadings be considered. *People ex rel. v. County Commissioners of Hamilton County*, 3 Neb. 244.

Where a good and sufficient alternative writ of mandamus has been issued and served, and no jurisdictional question is involved, it is the duty of the defendant to file his answer to such writ in the first instance; and as the answer, under the statute, is substituted for the return in the English courts and as the statute expressly prohibits any pleading except the alternative writ and the answer, the defendant should assign in his answer any legal reasons, as well as plead the facts, if any exist, on which he relies to defeat the issuance of the peremptory writ. And where a defendant files a motion to quash which is in the nature of a general demurrer, the court will treat such pleading as an answer admitting the facts recited in the alternative writ, and apply the law thereto. *Beadles v. Fry*, 15 Okla. 428.

EXTRAORDINARY WRITS.

election duly held in the said county of R. on the day of, 19.., for the purpose of relocating the county seat of the county of R., a majority of the votes cast at said election were in favor of the town of W. C. for said county seat. That the returns of said election were duly made to and canvassed by the county commissioners of said county of R., sitting as a board of canvassers. And upon said canvass it was ascertained and determined by said county commissioners, sitting as a board of canvassers, that a majority of the votes so cast at the said election as aforesaid were for the town of W. C., which finding and determination were proclaimed by the said board of county commissioners and were by them made a matter of record in the records of said county. That upon said proclamation of said election the then county officers of said county of R. removed from the town of L. C., where the county seat of said county of R. had theretofore been, with their respective offices, and books, records, papers and documents belonging to the same, and to the town of W. C. and held their respective offices at said town of W. C. and kept there the records, papers and documents of their respective offices until about the day of, 19.., at which time the then county officers, without any authority for so doing, removed their respective offices, together with the books, records, papers and documents belonging to the same, to the town of L. C., at which place they have since remained, and the present county officers now keep the same there, without authority of law for so doing, and pretend to do and transact the business of their respective offices at said town of L. C., and neglect and refuse to hold their respective offices and discharge the duties thereof at the town of W. C., and do compel the citizens of said county to transact their public business at said town of L. C., instead of transacting it at the county seat of said county, the town of W. C. And that upon and after the said proclamation, declaring and proclaiming W. C. to be the county seat of said county of R., the district court sitting in and for the said county held its terms at said county seat, W. C., until on or about the day of

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19.., when said court again held its terms at L. C., and has since said date, without authority for so doing, continued to hold the said terms of said court at the said town of L. C.

That since the said election and the canvass, determination and proclamation of result thereof, as aforesaid, there has not been in said county of R. any other election for the purpose of removing the county seat of said county, or for relocating the same, nor has there been any judicial determination setting aside or annulling or vacating the said election, determination or proclamation, which decided, determined and proclaimed the said town of W. C. to be the county seat of R. county; and that the said town of W. C. is now the county seat of said R. county, and has been the county seat of said county at all times since the said election and the canvass and determination and proclamation of the result of said election, to-wit, the day of, 19...

This is, therefore, to command you and each of you that you do immediately upon the receipt of this writ remove your respective offices from the town of L. C. to the town of W. C., in the county of R. together with all the books, records, papers and documents belonging to the same, and there remain and perform and discharge the duties of your respective offices as by law required, or show cause to the supreme court of the State of Kansas, on or before the day of, 19.., why you should not be required to do as is herein commanded.

In testimony whereof, etc.¹¹

976. RETURN TO ALTERNATIVE WRIT.

(Title—venue.)

Now comes the said E. F. (state title of office) and for his return to the alternative writ of mandamus heretofore issued in this cause and hereto annexed, for cause why he has not

¹¹ Form in State ex rel. v. Stock, 38 Kan. 154.

Form of alternative writ in action to compel mayor and council to execute and deliver bonds voted for waterworks. Smalley v. Yates, 36 Kan. 519.

Form of alternative writ. Cameron v. Parker, 2 Okla. 277.

EXTRAORDINARY WRITS.

and cannot do lawfully the things therein commanded, respectfully represents and shows to this court: that (state all facts relied on as a defense as required in good pleading).

All of which is respectfully submitted.

E. F. (official title.)

G. H., Attorney for Defendant.

(Verification if required.)¹²

977. RETURN IN NATURE OF A DEMURRER TO ALTERNATIVE WRIT TO COMPEL A COUNTY COURT TO ACCEPT AND APPROVE AN OFFICIAL BOND, ETC.

(Title—venue.)

For answer and return to said writ the defendant demurs to the petition and writ of the plaintiff in the above case, and assigns the following causes of demurrer, to-wit:

1. Said petition and the matters and things therein as stated and set forth are not sufficient in law or equity to entitle the plaintiff to the relief asked for in said petition, or to authorize the issuing of said writ of mandamus.

2. Said petition does not state or show that the plaintiff ever executed a bond to the satisfaction of the county court, within the time prescribed by the statute in such cases made

¹² **Defendant may, in his return to the alternative writ, set forth facts which show that he is under no obligation to perform the acts required to be performed by the alternative writ, and may also state in his return that nevertheless he has performed such acts.** Evans v. Thomas, 32 Kan. 469.

It is not a defense to an application for a writ of mandamus that the action which it is sought to compel has been enjoined, if it appears conclusively from the record, or from the conceded fact in the case, that the court which issued the injunction order had no power to enjoin the act in question. State ex rel. v. Carlson, 72 Neb. 837.

The plea of the pendency of another suit in bar is applicable to proceedings in mandamus. State ex rel. v. N. Lincoln St. Ry. Co., 34 Neb. 634.

The plaintiff may on the trial avail himself of any valid objection to new matter contained in the answer as to its sufficiency, or by proof in denial or by way of avoidance. State ex rel. v. Board of County Commissioners of Cass County, 60 Neb. 567.

A material averment in a petition for mandamus, not denied by the answer, is to be taken as true. State ex rel. v. Baushausen, 49 Neb. 558.

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and provided, in the sum of double the amount of revenue to be collected by him; nor does said petition show or state that the plaintiff ever at any time prior to the issuing of the writ in this case, and after the time of his alleged election to said office of sheriff of, filed in or tendered to the county court of said county a bond in double the amount of the revenue to be collected by him, for their acceptance with good and sufficient securities, as it was his duty, under the provisions of the statute in such cases provided, to do; not does he state or show the bond rejected by the county court was a good and sufficient statutory bond.

3. Said petition does not state that the bond tendered by the plaintiff and rejected by the defendant was a bond for at least double the amount of all the revenue to be collected by the plaintiff, or such a bond as it was the duty of the defendant in the discharge of their duties as a county court to accept and approve, or such a bond as the law requires and makes it their duty to approve.

4. Said petition does not state or show that the bond which the plaintiff asks this court to grant a peremptory mandamus to approve, was or is such a bond as the statute in such cases provided requires said plaintiff to tender to said court, to-wit, a bond in at least double the amount of all the revenue of said county to be collected by the plaintiff.

5. Said petition asks this court to review and vacate certain orders of the county court of said county of L. finding that the office of sheriff of said county was vacant, and calling a special election to fill said vacancy, and notifying the coroner of said county of said vacancy and requiring him to discharge the duties of said office until said vacancy was filled, and also the order rejecting the bond tendered by the plaintiff; but said petition does not allege or state that plaintiff ever made any motion in said county court to vacate said orders or any of them, or that said defendant has ever refused to vacate the same or to entertain any motion for their vacation, or that the said defendant has ever in any manner been solicited or moved to set aside or vacate the same.

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6. Said petition does not show that the plaintiff has exhausted or availed himself of all legal remedies (other than mandamus) to secure the vacation of said orders complained of in his petition, and the approval of his bond, or that he is otherwise without any adequate legal remedy.

7. Said petition is multifarious, contradictory, inconsistent, and uncertain.

8. Said petition does not show that the said plaintiff has ever executed any bond as sheriff of said county as required by the statute, and which is a condition precedent to his right to exercise the functions and duties of collector of said county of ¹³

978. MOTION TO QUASH THE ALTERNATIVE WRIT.

Comes now J. H. P., defendant in the above entitled cause and moves the court to quash the alternative writ issued herein for the following reasons:

1. Because the court had no jurisdiction to grant the relief prayed for.

2. Because said writ fails to state facts sufficient to entitle the plaintiff to the relief sought.

3. Because said writ did not state facts sufficient to constitute a cause of action against the defendant in favor of the plaintiff.

¹³ **Form of return** in application for writ to compel judge of district court to recognize the plaintiff as clerk of the court. *Matney v. King*, 20 Okla. 22, 25.

Form of return and answer to alternative writ. *Territory of Oklahoma v. Hopkins*, 9 Okla. 133, 143.

Form of return in action to compel the board of county commissioners to issue certain county bonds. *Chicago, Kansas and Western Ry. Co. v. Board of Commissioners*, 43 Kan. 760.

Form of return to alternative writ. *Cameron v. Parker*, 2 Okla. 277, 284.

Form of answer to alternative writ. *State ex rel. v. Stock*, 38 Kan. 154, 157.

Return to an alternative writ held insufficient. *Territory of Oklahoma ex rel. v. Caffrey*, 8 Okla. 193.

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4. Because as shown on the face of said writ and upon the allegations and statements therein contained, said plaintiff has a plain, speedy and adequate remedy at law.¹⁴

979. SAME—ANOTHER FORM.

(Title—venue.)

Now comes respondent and moves the court to quash the alternative writ of mandamus heretofore granted in the above entitled cause, and alleges as grounds therefor:

1. The petition for said writ on its face does not state sufficient facts to authorize the issuance of said writ.

2. The writ on its face does not state facts authorizing the recovery sought,

3. Upon its face said writ is illegal and void, and shows that it was improvidently issued.

4. Said writ and application are wholly and utterly insufficient in law.

5. Upon the face of the writ it is apparent that relator has an adequate remedy at law.

980. SAME—ANOTHER FORM.

The defendants in the above-entitled action hereby severally ask the court to quash the alternative writ of mandamus heretofore issued herein, for the reason that such writ fails to state facts sufficient to entitle the plaintiff to the relief asked.¹⁵

981. ANSWER TO RETURN.

(Title—venue.)

Now comes C. D., the above named relator, and for answer to the return of said E. F. to the alternative writ of mandamus herein:

1. Denies that (all allegations which it is desired to put in issue should be denied).

2. And for further answer to said return relator alleges (set up any new matter by way of avoidance).¹⁶

¹⁴ Form in *Cameron v. Parker*, 2 Okla. 277.

¹⁵ Form in *Riley v. Garfield Tp.*, 54 Kan. 463, 467.

¹⁶ A motion to quash the answer, if such a motion is proper, is not

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982. DEMURRER TO RETURN.

(Title—venue.)

Now comes C. D. relator herein and demurs to the return of E. F. to the alternative writ of mandamus issued in this cause for the reason that it appears upon the face thereof that the same does not state facts sufficient to constitute a defense, nor show any cause whatever for not obeying said writ.¹⁷

983. PEREMPTORY WRIT.

(Title—venue.)

The State of to E. F. (title of office), Greeting:

Whereas, on the trial of the issues in the above entitled cause this court has duly found and adjudged that (set forth facts found).

Nevertheless you have refused illegally and still do so refuse to (state duty to be performed) to the manifest injury of the said C. D. relator herein as this court has duly found and adjudged.

Now, therefore, we being willing that speedy justice should be done in this behalf to him, the said C. D., do command and enjoin you that immediately upon the receipt of this writ you (name specific duty to be performed), and we do also command that you make known to our said court on the day of, 19.., how you shall have executed this writ; and have you then and there this writ.

Witness, (same as form No. 974).¹⁸

equivalent to a motion to make the answer more specific and definite, or to strike out a part of it as redundant and superfluous, or to compel an election between different defenses; but it is a challenge of the substance of the defense or defenses presented, is equivalent to a demurrer, or a motion for judgment over the answer, and can only be sustained when in fact the answer contains no defense to the plaintiff's cause of action. *Crans v. Francis*, 24 Kan. 534.

¹⁷ Demurrer to the answer can only be sustained when the answer in fact contains no defense to plaintiff's cause of action. Pleadings are to be construed as in ordinary actions. *Finley v. Territory of Oklahoma ex rel.*, 12 Okla. 621.

¹⁸ The peremptory writ of mandamus must conform strictly to the command of the alternative writ, or, in the absence of the alternative

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writ, to the prayer of the petition which is the basis of the proceeding, and clearly indicate the particular duty to be performed. *Laflin v. State ex rel.*, 49 Neb. 614.

The statute authorizing issuance of a peremptory mandamus without notice has reference to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice. *Horton v. State ex rel.*, 60 Neb. 701.

No formal demand upon the defendants is necessary where their course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing. *Chicago, K. & W. Rd. Co. v. Comm'rs of Chase Co.*, 49 Kan. 399.

A court has no power to issue a peremptory mandamus without notice in an action brought to compel a railroad company to furnish cars to a shipper at a certain time and place, since it cannot be apparent that no valid excuse can be given. *State ex rel. v. Harrington*, 78 Neb. 395.

CHAPTER CXII.

QUO WARRANTO.

- 984. Information to test right of the respondents to discharge the duties of a public office.
- 985. Petition in *quo warranto* to oust defendant from exercising the duties of judge of circuit court.
- 986. Action by attorney-general to remove from office a county attorney for neglect or refusal to perform official duty.
- 987. Action to test the right to the office of county commissioner.
- 988. Allegations in an information to oust a foreign corporation.
- 989. Answer in an action to test the right to an office.
- 990. Answer in an action against a corporation to forfeit its franchise.
- 991. Demurrer to petition.
- 992. Motion for judgment on the pleadings.

984. INFORMATION TO TEST RIGHT OF THE RESPONDENTS TO DISCHARGE THE DUTIES OF A PUBLIC OFFICER.

The said F. A. G., R. S. G., and H. B. V., in their own behalf prosecute this action, the Attorney General having refused to prosecute the same, and give the court to understand and be informed:

1. That on the day of, 19.., the said relator, F. A. G., was a citizen of the United States and of the State of Nebraska and the city of L. in said state and was a resident and elector of said city and in all respects legally qualified to hold and exercise the duties and functions of the office of Mayor of said city, and that on said date he was duly elected to the said office of Mayor and duly qualified and entered upon the discharge of the duties of said office and continued to hold said office until and after the day of, 19... That on said day of, 19.., and hitherto he was and continued to be a citizen of the United States and of the State of Nebraska and of the said city of L. and an elector thereof and during all of said time had and now has all the qualifications re-

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quired by law to hold the said office of the Mayor of said city of L. That on the said day of, 19.., the said F. A. G. was duly reëlected to the said office of Mayor of said city and has duly qualified and entered upon the discharge of the duties of the said office and is now the duly elected, qualified and acting Mayor of said city and by virtue of his said office is a member and chairman of the excise board of said city of L. That the said R. S. G. and H. B. V. are and were on the day of, 19.., citizens of the United States and of the State of Nebraska and were and hitherto have been resident citizens and electors of said city of L. and had and have all the qualifications required by law to hold the said offices of members of the excise board of the said city of L. and on the said day of, 19.., were each duly elected to said offices for the term of two years and until the election and qualification of their successors in office and each thereafter and within the time required by law duly qualified in the manner required by law and entered upon the discharge of the duties of the said office and from said time hitherto have continued to discharge the duties thereof. That no successors in said office have ever been elected and qualified and they each are at this time the duly elected and qualified members of said board and, they with the Mayor of said city of L. constitute the duly elected and qualified excise board of said city of L. and are authorized and required by law and the ordinances of said city to perform all the functions and discharge all the duties devolving by law and said ordinances upon said excise board.

Notwithstanding the said election and qualification of your said relators and their having discharged and continuing to discharge the duties of said office and of said board, the said defendants, without ever having been elected to said offices or any of them on the day of, 19.., without any legal warrant claim, or right, have usurped, used and exercised and still do unlawfully usurp, use and exercise the office of the excise board and members thereof within and for said city in place of your relators and claim to be the

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members of said board and to constitute the same, and to exclude your relators therefrom, and to have, use and enjoy all the rights, privileges and franchises of said office and of the members of said board and to receive the fees, salary and emoluments thereof to the damage and prejudice to the right of the said city of L. and of these relators (plaintiffs) and also against the peace of the state.

. The relators therefore pray judgment that the defendants be declared not entitled to said offices, nor to act as the members of and constitute said board, and that they be ousted therefrom and that relators, F. A. G., R. S. G. and H. B. V. be declared entitled to said offices, to act as said board, and be reinstated therein, to assume the execution of the duties of said offices, as required by law.¹

¹ From form in record in State ex rel. v. Tibbets, 52 Neb. 228.

Statutory provision as to filing. Cob. Ann. Stat. Neb. 1911, sec. 1707 *et seq.*; Comp. Laws Okla. 1909, sec. 6189; Gen. Stat. Kan. 1909, sec. 6276.

Quo warranto will lie at the suit of one who claims to have received the greatest number of votes for a county office, not only to try the title to the office, but to remove the defendant therefrom as well. Tarbox v. Sughrue, 36 Kan. 225.

Original jurisdiction in proceedings in quo warranto is conferred upon the supreme court of Kan. by the constitution of the state (Const. art. 3, sec. 3). State v. Wilson, 30 Kan. 661.

The supreme court has jurisdiction of original actions in the nature of quo warranto when the issues involved are public juris, but if it appears that the issues of fact are such that a jury will be demanded, the cause will be dismissed as the supreme court has no power to summon a jury. State ex rel. v. Cobb, 24 Okla. 662.

Under the constitution and laws of Nebraska, the remedy of contest of elections and quo warranto are cumulative and concurrent. State ex rel. v. Cosgrove, 85 Neb. 187.

When private person may file. Cob. Ann. Stat. Neb. 1911, sec. 1706; Comp. Laws Okla. 1909, sec. 6190; Gen. Stat. Kan. 1909, sec. 6277.

Quo warranto proceedings begun by the relator in his own behalf as claimant to the office, in the prosecution of which the county attorney joined as one of the attorneys in the case, held to be sufficient to show that the action is brought with the consent of the county attorney, as required by the statute. Duffy v. State ex rel., 60 Neb. 812.

An application in the nature of an information in quo warranto filed by a private citizen to recover the possession of a public office is fatally defective if it omits to allege that the relator has applied to the prose-

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985. PETITION IN *QUO WARRANTO* TO OUST DEFENDANT FROM EXERCISING THE DUTIES OF JUDGE OF CIRCUIT COURT.

Comes now the State of K. by J. S. J. the duly elected, qualified and acting attorney general of the plaintiff state, and prosecuting in its behalf, gives the court to understand and be informed that F. D. H., a citizen of the State of K. and resident of W. county therein, unlawfully holds and exercises the functions of a civil public officer and magistrate in said state, namely, judge of the circuit court of W. county, K. And the said defendant as such judge assumes to exercise and does exercise all the honors, powers, privileges and prerogatives of the judge of the State of K. in a court of general jurisdiction within the State of K. in the county of W.

And the plaintiff herein further informs the court that the only foundation for the authority of the said defendant to exercise the functions, powers, liberties, privileges and pre-
euting attorney to file the same, and that the latter has refused or neglected so to do. *Harpham v. State ex rel.*, 63 Neb. 396.

A private person cannot appear as relator where he does not claim the right to the office. In such case the prosecution is on behalf of the public, and must be conducted by the proper public officer. *State ex rel. v. Stein*, 13 Neb. 529.

Private individuals, who have no interest other than as citizens, residents, and taxpayers of a municipal corporation, cannot maintain an action of *quo warranto* against such corporation. *Miller v. Palermo*, 12 Kan. 21.

The attorney-general is the proper officer to institute proceedings in *quo warranto* in the supreme court, and not a district attorney. *State ex rel. v. Cones*, 15 Neb. 444.

A private person cannot use the name of the state in an action of *quo warranto* for the disorganization of an incorporated city when the purpose of the action is to withdraw the property of such person from municipal taxation. *State ex rel. v. Shufford*, 77 Kan. 263.

An action in the nature of *quo warranto* may be maintained in the name of the state by the attorney-general to oust the board of regents of the university of Kansas from the exercise of corporate powers in excess of those conferred on it by law. *State ex rel. v. Regents of University*, 55 Kan. 389.

An information filed by consent of the district attorney, and in his name, but not officially signed by him, held, no error. *Kane v. People ex rel.*, 4 Neb. 509.

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rogatives of a magistrate of the State of K. in W. county is founded upon a certain pretended act of the K. legislature which appears in Chap. 52 of Session Laws of K. of 1908 and is entitled (here set out act referred to).

And the plaintiff alleges that the said act, to-wit, Chap. 52 of the Session Laws of Kansas of 1908, is a plain and flagrant violation of section 17 of article 2 of the Constitution of the State of Kansas as amended by the electors of said state at the general election, 1906.

Wherefore plaintiff prays that the defendant F. D. H. may be required to answer *quo warranto* he exercises the powers, functions, liberties and privileges of a judicial magistrate and a civil officer of the State of K. in W. county and that upon final hearing a judgment of ouster be issued against the said F. D. H. and that he be ousted, prohibited, restrained and enjoined from acting as a circuit judge or other judicial magistrate in W. county in the State of K. through any claim of right or pretense of right flowing from Chap. 52 of the Session Laws of 1908, and that the plaintiff have its costs in this behalf expended.²

² Form in State ex rel. v. Hutchins, 79 Kan. 191.

Writ abolished. Comp. Laws Okla. 1909, sec. 6188; Gen. Stat. Kan. 1909, sec. 6275.

Removal from office by information in the nature of *quo warranto*, in Kansas, is a civil proceeding, and the statutes of Kansas providing such remedy are not unconstitutional. Foster v. State, 32 Kan. 765.

In an action to obtain possession of a public office, instituted by a private party, he must both plead and prove such facts as show him entitled thereto; but where the action is instituted by the attorney-general, the burden is on the respondent to show his title. State ex rel. v. Davis, 64 Neb. 499.

When an information is filed by a private person to oust the incumbent from an office and instate the relator therein, it must state facts showing the relator's right to the office. State ex rel. v. Hamilton, 29 Neb. 198; State ex rel. v. Stein, 13 Neb. 529.

Where relators, in an action of *quo warranto* to oust respondents from certain offices and obtain possession thereof, base their right to the relief on the unconstitutionality of a statute under which respondents claim to occupy the offices, and the arguments and reasons for declaring such law unconstitutional would be equally forcible and effective as against the law under which relators assert title to the offices, the relators have no standing and cannot prevail in the litigation.

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986. ACTION BY ATTORNEY-GENERAL TO REMOVE FROM OFFICE A COUNTY ATTORNEY FOR NEGLECT OR REFUSAL TO PERFORM OFFICIAL DUTY.

1. The State of K., on the relation of W. A. J., attorney general, and by virtue of the authority vested in him by law, gives the court here to understand and be informed, that at the general election of the year 19.., and on the day of, 19.., said defendant, J. F., was duly elected to the office of county attorney of S. county, K., for the term of years, and having duly qualified, did, on the day of, 19.., enter upon the discharge of the duties of said office of county attorney; and that ever since said day of, 19.., said J. F. has been acting as county attorney of said county; that during the time said J. F. was so as aforesaid acting as county attorney of said county, and from the month of, 19.., continuously to the present time, certain persons, to-wit, C. H., T. M. L., G. B., W. S. and others have been engaged in said county and city of S., the county seat thereof, in the willful, open and notorious sale of intoxicating liquors in violation of law, and especially of the act known as the prohibitory liquor law; that each and all of said persons have kept in said city of S. and maintained open and public
tion. State ex rel. v. Stuht, 52 Neb. 209; State ex rel. v. Moores, 52 Neb. 634.

Where relator's right to a public office is grounded upon the proposition that a legislative act is unconstitutional, it is not necessary to allege that the act is unconstitutional, where the supreme court has previously determined that such act is in conflict with the constitution. State ex rel. v. Loer, 82 Neb. 602.

In a proceeding by *quo warranto* to try the right of the relator in the cause to the office of county treasurer the information must state facts showing that the relator is entitled to the office of which he claims to be unlawfully deprived. State ex rel. v. Stein, 13 Neb. 529.

A petition which shows that the number of ballots cast for plaintiff, which were wrongfully rejected as mutilated ballots, when added to the number of ballots counted for the plaintiff, only make a tie between the plaintiff and the defendant, in the absence of an allegation that the commissioners did not determine by lot which should be elected, as provided in section 63 of the election law of 1899 (Okla.), fails to state a cause of action, and a demurrer directed thereto on that ground should be sustained. Roberson v. Hubler, 11 Okla. 297.

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liquor saloons, in which were sold various kinds of intoxicating liquors, neither of said persons having or pretending to have any right, permit, or authority to deal in or sell such liquors; that the fact of such violation of law by said above named persons was well known by said J. F. from information received by him from others, as well as from his own personal observation and experience, he being a frequenter and patron of such illegal saloons during said time; yet the said J. F., though well knowing that said persons were guilty of violating the provisions of said law known as the prohibitory liquor law, and that it was his duty as such county attorney to prosecute them for such violation, "neglected and refused so to do" and by frequenting and patronizing their places of such illegal business, "did encourage" them to continue to violate the law.

2. That on the day of, 19.., the sheriff of said county, having knowledge of the aforesaid violations of said prohibitory liquor law, gave notice in writing to said defendant, as required by section 12 of said law, that said persons above named were selling intoxicating liquors in violation of law, and furnished him with the names of numerous witnesses, all being credible and good citizens of said city of S., by whom such illegal sales could be proven; and the said J. F. having inquired into the facts of such alleged violation of said law, knew that the same were true, and well knew from such inquiries, "as well as from his own personal knowledge and experience," that there was reasonable ground for instituting a prosecution against each of said persons for such violation of law; that said J. F. thereupon and on the day of, 19.., filed complaints before a justice of the peace against said persons, charging them upon his oath as county attorney with such violation of law, but did the same corruptly, and not in good faith for the purpose of prosecuting and convicting said guilty persons; and after repeated voluntary and inexcusable delays and continuances of all the cases in which complaints were so filed, from the day of, 19.., to the day of, 19.., said J. F. not being permitted by the justice

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of the peace to still further delay and continue said cases without cause, did dismiss each and all of said cases without any just cause or excuse therefor, and well knowing that each of said persons was guilty as charged by him in said complaints, and that such guilt could be proven upon a trial, that the said J. F. in delaying the prosecution of said cases and dismissing the same as aforesaid was corruptly influenced in his duty as county attorney by a desire to shield and protect said guilty persons from the consequences and penalties of their crimes, to the utter disregard of the duties of his office and to the scandal of the administration of justice.

Wherefore, said attorney general, on behalf and in the name of the State of K., prays judgment that the said J. F. by reason of his aforesaid acts, refusal to act, and misconduct, may be adjudged and declared to have forfeited his said office of county attorney of S. county, Kansas, and that he be ousted and removed therefrom.³

987. ACTION TO TEST THE RIGHT TO THE OFFICE OF COUNTY COMMISSIONER.

Now comes L. B. K., attorney general of the State of K., and gives the court to understand and be informed that, at the general election held, ..., 19.., in the commissioner's district in and for the county of M., the defendant, C. M. P., was a candidate for the office of county commissioner for said district, and received a majority of votes cast in said district, for said office, and upon the canvass of the returns of said election by the board of county commissioners of said county, sitting as a canvassing board, the defendant, P., was declared to have been elected to said office, and in the month of, 19.., the defendant entered upon the discharge of the duties of said office, and has ever since continued to exercise the duties pertaining to said office, and is still exercising the powers, duties and privileges appertaining thereto.

³ Sustained against demurrer in State ex rel. v. Foster, 32 Kan. 14.

Form of petition to oust a city from the unlawful assumption of the power of licensing the sale of intoxicating liquors as a beverage. State ex rel. v. Topeka, 30 Kan. 653.

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The attorney general further gives the court to understand and be informed that, at the time said election was held, at the time said canvass was made, and at the time the defendant entered upon the discharge of the duties of said office, the defendant was ineligible to be elected to said office, and is ineligible to hold the same, for the reason that at the time said election was held, and at the time the defendant pretended to qualify as such county commissioner, and at the time he pretended to enter upon the discharge of the duties of said office, the defendant was the duly-appointed and qualified city clerk of the city of W. P., and was holding said office and performing the duties thereof, the said city then and there being duly incorporated as a city of the third class, and by virtue of the laws of the State of Kansas.

Wherefore the said attorney general demands judgment against the defendant, C. M. P., that he be ousted from said office, and that the plaintiff have and recover of and from the defendant its costs in this behalf expended.⁴

986. ALLEGATIONS IN AN INFORMATION TO OUST A FOREIGN CORPORATION.

3. The said defendant, as a non-resident corporation of the State of K., has never been authorized or in anywise qualified to engage in business in said state or to exercise any of its corporate powers or functions therein, and has never received or been accorded any license or permission from the charter board of said state authorizing or empowering it to transact business or exercise any of its corporate powers or functions in said state, nor has the secretary of said charter board ever issued to it a certificate setting forth that

⁴ Form in State ex rel. v. Plymell, 46 Kan. 294.

Allegations of information to test the right to the office of mayor. State ex rel. v. Moores, 52 Neb. 770.

Form of information in action to test the right to the office of governor. State ex rel. v. Boyd, 31 Neb. 682, 690.

Form of petition to remove a person from the office of county commissioner. State ex rel. v. Scates, 43 Kan. 330.

Form of petition in quo warranto to oust certain persons from office. State ex rel. v. Addison, 76 Kan. 699.

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any application by it to said board to transact business in said state had been granted.

4. Notwithstanding the said defendant has never received license or permission to transact business in said State of Kansas or exercise its corporate functions and powers therein, or in anywise qualified itself to engage in business in said state, it does engage, and for three months or more last past has engaged, in business in said state as a non-resident corporation, and does exercise, and during the said time has exercised, its corporate powers and functions in said state, and therein, in the county of M. and other counties in said state, has and does engage in the business of buying and selling land and of making, taking and assigning leases of lands for the purpose of prospecting on and developing the same for petroleum oil and natural gas, and does prospect for, develop and produce petroleum oil and natural gas, and has and does lay and maintain pipes or mains for the transportation of natural gas, and does purchase and has purchased the property and lines of mains or pipes of other gas-producing and gas-piping and transporting corporations, companies, and persons, and has and does purchase said gas from the owners of gas-wells, and transports said gas in its said pipes or mains and sells the same to consumers, and contracts with other corporations and with companies and persons for the laying of pipes or mains for the transportation of natural gas, and in divers ways and manners gives out and pretends that it is a corporation duly and legally authorized to transact business as such in the State of Kansas, and in divers ways and manners does exercise the business and franchise of a corporation engaged in the business of producing, transporting and selling natural gas, contrary to the statutes of said State of Kansas made and provided.⁵

⁵ Form in State ex rel. v. Kansas Natural Gas Co., 71 Kan. 785.

The state may bring an action of quo warranto to test the validity of a corporate organization either against the persons who officially undertake to exercise its powers and franchises or against the organization itself by the name it assumes; and, in either case a valid and binding judgment of nullity may be rendered. Gardner v. State, 77 Kan. 742.

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989. ANSWER IN AN ACTION TO TEST THE RIGHT TO AN OFFICE.

For answer to the petition of the said plaintiff, defendant says:

1. Defendant admits that at the general election held , 19.., in the commissioner's district in and for the county of M., he received a plurality of the votes cast in said district for the office of county commissioner, and further admits that he received a certificate of election as said commissioner for the third district of said county, and further admits that he entered upon the discharge of the duties of said office in the month of , 19.., and has ever since exercised and is now exercising the powers, duties and privileges appertaining to said office.

2. And said defendant, for a second defense to said petition, says that at the time of the general election in M. county, Kansas, held , 19.., the city of was pretending to have been organized, and was acting as a duly-incorporated city of the third class, but that, as a matter of fact, the city of was not duly incorporated as a city of the third class. And said defendant further admits that, at the time of said general election, he was appointed and acting as said city clerk of said pretended city of , K., and had qualified as said clerk before said election. But this defendant denies that at the time he qualified as county commissioner, and at the time he entered upon the discharge of the duties of his office as said commissioner, he was the appointed and qualified city clerk of said pretended city of And this defendant further says, that subsequent to said election held in said county on the

The question of whether a railroad company intends in good faith to carry out the declared objects of its organization cannot be inquired into in *quo warranto* proceedings. State ex rel. v. Martin, 51 Kan. 462.

An action to annul the charter of an incorporated city on the ground that it was illegally organized must be brought in the name of the state, by some officer authorized to represent the interests of the public, as the attorney-general or the county attorney. State ex rel. v. Shufford, 77 Kan. 263.

Form of information in an action against a corporation to forfeit its franchises. State ex rel. v. Atchison & Neb. Ry. Co., 24 Neb. 143, 148.

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..... day of, 19.., he resigned the office of city clerk of said pretended city of, K., at an open meeting of the mayor and council of said pretended city, and that his resignation as city clerk of said pretended city was then and there duly accepted. And said defendant further says, that at no time since his resignation, and at its acceptance, which occurred on or about the day of, 19.., was he reappointed to the said office of city clerk of said pretended city.

3. And said defendant, for a third ground of defense to said petition, says that he denies that the said city of, K., was, at the time of said general election held in said county on the day of, 19.., or at any time subsequent thereto, a duly-incorporated city of the class under and by virtue of the laws of the State of K.

4. And said defendant, for a fourth ground of defense to said petition, says that he denies each and every other allegation in said petition not hereinbefore specifically denied.⁶

990. ANSWER IN AN ACTION AGAINST A CORPORATION TO FORFEIT ITS FRANCHISE.

That the supreme court of the State of K. ought not to take jurisdiction in this case, for the reason that no public question is involved therein; that this suit was instituted at the request and suggestion of the attorneys of one A. T. S., who is the principal owner of the E. U. and so called Low-line irrigating canals; that the canals of this defendant and of the said A. T. S. come into competition with each other, and the said A. T. S. is attempting to monopolize the entire irrigating business of F. county, and as a part of his said design to monopolize the irrigating business as aforesaid, he is endeavoring by all means in his power to obstruct, hinder and delay this defendant in the construction of its canal; that in order to protect its rights, the defendant, prior to the institution of this suit, brought a suit in the district court of F. county, against the Low-line C. Company; one of the

⁶ Form in State ex rel. v. Plymell, 46 Kan. 294.

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companies above named, which is now pending and undetermined; that it was upon the representation and statements of the said S. and his attorneys that the attorney general was induced to bring this suit, and the institution thereof is one of the means used by the said A. T. S. to hinder, delay, annoy and oppress this defendant; and that the matters involved in this suit are solely matters of private interest between this defendant and the said A. T. S., and not of a public nature. Defendant therefore asks the supreme court to dismiss said suit.

Further answering, the defendant denies that it has assumed or pretended as of right to possess or use, pursuant to a purchase, the franchise of the E. I. Company; denies that it is now unlawfully exercising or in any manner using the powers, privileges or franchises of the said E. I. Company; denies that it has attempted, by purchase or otherwise, to succeed to the franchises authorized by law to be exercised by the said E. I. Company; denies that it is usurping, intruding into, or is unlawfully holding or exercising any franchise whatever.

And further answering, defendant says: It has no knowledge or information of the existence of a corporation named the E. I. Company or that any such company ever existed in the State of K., or at any other place.⁷

⁷ Form in State ex rel. v. Western Irrigating Canal Co., 40 Kan. 96. Answer of respondent. Cob. Ann. Stat. Neb. 1911, sec. 1712.

The respondent must answer precisely by what statutory authority he exercises the functions of an office. State ex rel. Sabin v. Tillma, 32 Neb. 789.

An answer to a petition in *quo warranto*, which alleges that the respondents are holding the office in question by lawful appointment, under the provisions of a legislative act, and which sets forth the facts in relation thereto, is sufficient to put the validity of such act in issue. State ex rel. v. Nolan, 71 Neb. 136.

An allegation in an answer to an information in the nature of a *quo warranto*, that the defendant had given a bond "for the faithful performance of all the duties required by law of him in consequence of his said election to the office" in question, is a sufficient allegation that he has given the bond required by law. People v. McCallum, 1 Neb. 182.

Where a defendant, in an action of *quo warranto* against him, admits

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991. DEMURRER TO PETITION.

Now come the defendants in the above entitled cause and file this their joint and several demurrer, to the information filed in said cause for the reasons.

1. Because said petition does not, nor does either of the alleged causes of action therein, state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendants, or either of them.

2. Because said petition shows upon its face that said plaintiff has no legal capacity to sue on the alleged second cause of action stated in said petition.

3. Because said petition shows upon its face that there is a defect of parties plaintiff, in this, that said action is not brought or prosecuted by the C. L. S. Company mentioned in said petition, the real party in interest.

4. Because said petition shows upon its face that several alleged causes of action are improperly joined therein, in this: (Set out how misjoinder exists.)⁸

992. MOTION FOR JUDGMENT ON THE PLEADINGS.

Comes now the State of K. plaintiff herein by F. S. J., its attorney general, and moves the court for judgment as prayed for in its petition herein filed notwithstanding the answer of said defendant for the reason that said answer does not state facts sufficient to constitute a defense or raise any issue to be tried in said action.⁹

in his answer that upon the face of the election returns the plaintiff was elected to the office in dispute, but alleges that the returns should not control, because plaintiff obtained his election by fraud and illegal votes yet, if the defendant, having by the pleadings the burden of the issue, fails to produce any testimony supporting his answer, judgment will be rendered for the plaintiff upon the pleadings. *Brown v. Jeffries*, 42 Kan. 605.

A jury trial is not demandable as a matter of right in a proceeding in *quo warranto*. *Wheeler v. Caldwell*, 68 Kan. 776.

Form of answer to petition to oust the defendant from exercising the duties of the circuit judge. *State ex rel. v. Hutchins*, 79 Kan. 191.

⁸ Sustained in *State ex rel. v. Shufford*, 77 Kan. 263, 265.

⁹ Form in *State ex rel. v. Hutchins*, 79 Kan. 191.

CHAPTER CXIII.

MOTIONS AND NOTICES.

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993. PETITION FOR APPOINTMENT OF NEXT FRIEND OF INFANT UNDER THE AGE OF FOURTEEN YEARS.

State of,
County of, } ss.

To the court within and for the county of,
State of

Your petitioner C. D. respectfully represents: That he is the father (or a relative or friend) of S. L., an infant under the age of fourteen years, namely of the age of years, that said infant resides with your petitioner at, in the county of, State of

Your petitioner further represents that said infant desires to commence and prosecute a suit against E. F. for the sum of dollars on account of (set out general nature of suit, as injuries received by said infant on the day of, 19.., resulting from said infant falling into a ditch or drain constructed in a careless or negligent manner and suffered to remain in a dangerous condition by said E. F., etc.), that said infant has no legally constituted guardian or curator, and intends to institute said suit in this court.

Your petitioner hereby consents to serve as the next friend of said infant for the purpose aforesaid and agrees to be responsible for the costs of said suit.

Wherefore your petitioner prays that he may be appointed as the next friend of said infant for the purpose of instituting and prosecuting said suit on behalf of said infant in this court. C. D.

(Date.)

In the court within and for the county of,
State of

Before me, ..., clerk of the court of,
..... (or judge, etc.), appeared C. D. and acknowledged that he executed the above written consent to serve as the

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next friend of S. L., an infant, in a suit of said infant against E. F. to be instituted in this court.

.....,
Clerk (or judge) of Court.¹

994. NOTICE OF APPLICATION OF APPOINTMENT OF NEXT FRIEND.

To L. D., with whom S. L., an infant, resides:

You are hereby notified that I, C. D., the father of S. L., an infant under the age of fourteen years who resides with you, shall make application to the court, within and for the county of, on the day of, 19.., at the hour of M. or as soon thereafter as I can be heard, for an order for my appointment as next friend to said infant, to institute and prosecute a suit in behalf of said infant against E. F. for the sum of dollars on account of (as in preceding form).

(Date.)

C. D.

995. PETITION FOR THE APPOINTMENT OF NEXT FRIEND OF INFANT OF THE AGE OF FOURTEEN YEARS.

State of,
County of, } ss.

To the court within and for the county of,
State of

Your petitioner, S. L., respectfully represents that he is an infant of the age of fourteen years and under the age of twenty-one years, namely, of the age of years; that he has a good and meritorious cause of action against E. F., and desires to commence and prosecute a suit on account thereof in this court for the sum of dollars, said cause of action arising as follows: (the general nature of the suit may be stated briefly).

Your petitioner further represents that he has no legally constituted guardian or curator, authorized to institute and prosecute said suit in his behalf; that A. B. is willing and has consented in writing to act as next friend for him for

¹ Statutory provision. Comp. Laws Okla. 1909, sec. 5566; Cob. Ann. Stat. Neb. 1911, sec. 1035; Gen. Stat. Kan. 1909, sec. 5626.

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the purpose mentioned herein, said consent being endorsed hereon.

Wherefore your petitioner prays for an order appointing said A. B. as his next friend, to bring and prosecute said suit.

S. L.

The undersigned A. B., designated in the foregoing petition, hereby consents in writing to act as next friend for S. L., the infant who presents the above application, for the purpose mentioned therein.

A. B.

(Acknowledged or proved as in form No. 993.)

996. POVERTY AFFIDAVIT (OKLAHOMA AND KANSAS).

State of, }
County of, } ss.

In the district court of said county.

I (or we) do solemnly swear that the cause of action set forth in the petition hereto affixed is just, and I (or we) do further swear that by reason of my (or our) poverty, I (or we) am (or are) unable to give security for costs.²

997. MOTION TO DISMISS AGAINST NON-RESIDENT FOR FAILURE TO GIVE SECURITY FOR COSTS (NEBRASKA).

Now comes C. D., the defendant herein, and moves the court to dismiss the above entitled cause because the plaintiff herein was not a resident of, and was not residing within, this state at the time of the institution of the above entitled cause, and has failed to make a deposit or provide security for costs of court, as required by law.³

998. MOTION TO DISMISS FOR WANT OF JURISDICTION ON APPEAL FROM JUSTICE OF PEACE SETTING UP DEFECTIVE SERVICE.

Now comes C. D., defendant herein, and appearing for the purpose of this motion only, moves the court to dismiss

² Statutory form, Comp. Laws Okla. 1909, sec. 6108; Gen. Stat. Kan. 1909, sec. 6202.

³ Cob. Ann. Stat. Neb. 1911, sec. 1623.

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the above entitled suit for the reason that this court has acquired no jurisdiction whatever over the person of defendant, and, therefore, has no legal power to proceed with the trial hereof, because A. B., the justice of the peace who assumed jurisdiction of said suit and proceeded to trial and rendered judgment therein and from which void judgment the appeal herein was taken, acquired no jurisdiction whatever over the person of defendant, since the service of the summons therein on defendant, as appears on the face of the return of the constable, is insufficient in law and not in compliance with the statute in such case made and provided, in this, namely (set out specifically the defective service and show wherein the statute is not observed).

999. MOTION FOR CONTINUANCE.

Now comes A. B., the plaintiff herein, and moves the court to grant him a continuance of the above entitled cause until the next term of this court for the reason that (set out reason).

(Affidavit.)

1000. MOTION FOR CONTINUANCE FOR ABSENCE OF WITNESS.

R. S. B., being first duly sworn, on oath states that he is the attorney for the defendant above named. Affiant further states that said defendant is a corporation organized under the laws of the State of and doing business in the city of, G. county, in said state, said business being the manufacturing of tiling, sewer pipes, brick, etc.; that said defendant cannot safely proceed to trial in the above entitled cause at the present term of court on account of the absence of one C. H., a material and important witness on the part of the said defendant, and that said witness is now a resident of the State of C., the exact place in C. where said witness is residing being unknown to affiant, although he has made diligent inquiries in the endeavor to find out the post office address of said C. H., as have also the officers of said defendant; that said C. H. formerly resided in the city of B., G. county, Nebraska, but left for C. before

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the commencement of this action. That the said defendant expects to prove by the said C. H. (who is the pressman referred to in plaintiff's petition) (here set out facts witness will testify to).

That he knows of no other person or persons by whom the above stated facts can be proven; and affiant further states that when he was employed as attorney for the defendant, he supposed that the present pressman at defendant's works was the one who was working there when plaintiff was injured, and that it was only a short time ago, and since the commencement of this term of court, or immediately prior thereto, that he discovered otherwise; that this affiant and the officers of said defendant have used due diligence, by making every inquiry possible to find the whereabouts of said C. H., and have asked all of those who would be likely to know here what his post office address is, but could get no further information than that he was in C.

Affiant further says that he expects to procure the testimony of said C. H. at the next term of this court; that it would be dangerous for defendant to proceed to trial in said action without the testimony of said witness, and affiant further says that this application for continuance is not made for delay, but that justice may be done.⁴

⁴ Form in Beatrice Sewer Pipe Co. v. Erwin, 30 Neb. 86.

Motion on ground of absent witness must state where witness resides, if known, the probability of procuring his testimony within a reasonable time, that the facts which affiant believes said witness will prove are believed to be true. *St. Louis & S. F. Ry. Co. v. Cox*, 26 Okla. 331.

Must clearly state the facts which applicant expects to prove by the absent witness, and the materiality of such facts must be made to appear from the application, and it must state that the applicant believes the facts to which the absent witness will testify are true. *Terapin v. Barker*, 26 Okla. 93.

Affidavit supporting a motion for continuance on account of the absence of a material witness must show that the party has been sufficiently diligent in his efforts to obtain the witness. It must set forth specific acts of diligence, such as search and inquiry. It is not enough that the party alleges that he made diligent inquiry, without stating how, where, and of whom he inquired. *Struthers v. Fuller*, 45 Kan.

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1001. MOTION TO QUASH RETURN OF SERVICE—SPECIAL APPEARANCE.

The defendant appearing specially and only for the purposes of this motion and for no other purpose, moves the court to quash and set aside the service of the writ on said defendant, and the return thereof, for the reason that it shows upon its face that it is null and void, and not in compliance with the statutes of this state, relative thereto, and for the reason that this court has no jurisdiction over the person of said defendant.

1002. MOTION TO QUASH RETURN OF SERVICE.

Now comes A. B., the defendant herein, and appearing for 735; Kilmer v. St. L. Ft. S. & W. Ry. Co., 37 Kan. 84; Payne v. First National Bank, 16 Kan. 147.

The facts constituting the due diligence must be set forth. Crutchfield v. Martin, 27 Okla. 764.

Application on the ground of the absence of testimony must show what the absent testimony is, that the opposite party may, if he desire, prevent a continuance by consenting to the admission of such testimony. Brown v. Johnson, 14 Kan. 290.

It should give the names of absent parties whose testimony was desired, and the nature of their testimony. Life Ins. Clearing Co. v. Altschuler, 53 Neb. 481.

Affidavit must show the materiality of the testimony of the absent witness. Lomax v. Holbine, 65 Neb. 270.

Affidavit must set out the facts and circumstances to which the absent witness will testify, and must show that there are no other available witnesses by whom the facts known by the absent witness can be proved. Diedrichs v. Diedrichs, 68 Neb. 534.

Motion and the affidavit must show that if a continuance was granted the evidence of the absent witness or his personal attendance could or would be obtained. McClelland v. Scroggin, 48 Neb. 141.

Where an affidavit is based upon information derived from others, it should give their names and whereabouts, and also sufficient reason for not procuring their own affidavits to the facts communicated, which should be done if possible. Comstock v. State, 14 Neb. 205.

The statement of facts in an affidavit should be specific of acts done, or of excuses for not doing them, and given with such particularity that an indictment for perjury would lie in case of its being false. Ingalls v. Noble, 14 Neb. 272.

Motion on ground of loss of deposition taken in the case, must set out the testimony contained in the deposition. Felton v. Moffett, 29 Neb. 582.

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the purpose of this motion only, moves the court to quash the return to the writ of summons in the above entitled cause, for the reason that said return does not show that defendant has been served with process in the manner prescribed by the statute, in this, namely (point out defect).

1003. MOTION TO DISMISS FOR WANT OF JURISDICTION.

Now come the said defendants for the purpose of this motion only, and not appearing herein for any other purpose, and move the court to dismiss this action upon the ground that it has no jurisdiction of the parties defendant, for the reason that no service of a summons, either actual or constructive, has been made upon said defendants, or either of them, nor have they, or either of them, entered their appearance herein in any manner, except for the purpose of this motion.⁵

1004. MOTION TO DISMISS FOR WANT OF JURISDICTION OF THE PERSON.

Now comes the defendant, R. S. T., for the purpose of this motion only and for no other, and moves the court to dismiss this action for the reason that the court has no jurisdiction over the person of this defendant, and that this action is improperly brought in this county; that the defendant, R. S. T., against whom alone this plaintiff seeks judgment and whose property plaintiff claims to have attached in this suit, is a resident of the county of R., State of Kansas, and has been for several years last past; that there has been no service had upon said defendant in this county, and the court has no jurisdiction over his person or the subject matter of the action.⁶

1005. DEFENDANT'S PLEA TO THE JURISDICTION AND MOTION TO DISMISS.

Now comes the defendant herein and for the purpose of this motion only, denies that the court has or can have any

⁵ Form in *Anglo-American Packing and Provision Co. v. Turner Casing Co.*, 34 Kan. 340.

⁶ Form in *Thompson v. Greer*, 62 Kan. 522.

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jurisdiction of the defendant in this cause, and moves to quash the writ issued herein, for the reason:

1. That it appears upon the face of the petition that the defendant is a corporation, organized, existing and operating solely within the State of, and is not operating its railroad and never did within the State of, and that neither has it an office in the State of, neither does it transact any business in the State of and has never entered the State of for the purpose of transacting any of its business, nor neither has the defendant an office, chief or otherwise in this state, or any agent or officer in charge of any office in this state, nor has it any agent in this state, nor has it ever had any agent or office in this state for the transaction of its business.

2. Defendant further moves to quash the return of the sheriff herein, for the reason that it is not sufficient to show that the said court of M. county or any other court in has jurisdiction over the defendant, and for the reason that it does not show that defendant has an office or is doing business in this state.

3. For the reason that it is shown that the defendant is not engaged in business in this state, and was not so engaged at the date of the service herein, and the defendant prays the court to dismiss plaintiff's petition for want of jurisdiction.⁷

1006. MOTION TO MAKE PLEADING MORE DEFINITE AND CERTAIN.

Now comes the defendant in the above entitled cause and moves the court to require the petition filed herein to be made more definite and certain in these particulars, namely: (set out parts which are believed to be indefinite and uncertain) for the reason that (allege why the allegations are indefinite and uncertain).

⁷ A motion objecting to the jurisdiction of the court over the person of the defendant must state specifically the grounds of the objection. *Forbes v. McHaffie*, 32 Neb. 742.

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1007. TO MAKE PLEADING FOR KILLING STOCK BY RAILROAD MORE DEFINITE AND CERTAIN (concluding paragraph).

Therefore, the premises considered, defendant prays the court to require the plaintiff to make his complaint more definite and certain in this: That said plaintiff shall allege the specific day on which the injury is claimed to have occurred, and the course and character of the train, the hour of the day, and the particular point on the track, or else that plaintiff be required to give the number of the train by which defendant effects its operation; and if the plaintiff fails to make his complaint more specific in this relation, defendant moves the court to dismiss the same.⁵

⁵ **Indefiniteness of a pleading is not ground for demurrer**, but is reached by motion to make more definite and certain. *Stewart v. Bole*, 61 Neb. 193; *Armstrong, Byrd & Co. v. Crump*, 25 Okla. 452.

Formal defects of a pleading must be raised by motion asking a more definite and specific statement. *Grant v. Commercial Nat. Bank*, 67 Neb. 219.

Motion should state in what particular the pleading is not sufficiently definite and certain. *Gilmore v. Norton*, 10 Kan. 369.

Objections by a motion to require a pleading to be made more definite and certain, should specifically point out the alleged defects; and a motion to require "the plaintiff to make the allegations in his petition more specific and certain," without further particularity is too general. *Fischer v. Coons*, 26 Neb. 400.

Objection to statement of facts constituting a cause of action as a matter of information and belief should be made by motion. *Myers v. Bealer*, 30 Neb. 280.

Sustaining or refusing motion to make more definite and certain is largely in the discretion of the trial court. *Combs v. Thompson*, 68 Kan. 277.

But when the allegations of a petition are so indefinite and uncertain that the precise nature of the charge is not apparent, it is error for the court to overrule a motion of defendant to require the pleading to be amended, if the defendant is likely to be embarrassed in his defense by reason of the character of such allegations. *Water-Power Co. v. McMurray*, 24 Kan. 46.

Where it cannot be determined whether or not there is a misjoinder of causes of action, by reason two causes of action being imperfectly stated in the complaint the remedy is by motion to make more definite and certain. *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653.

Motion should be made before case is called for trial. *St. Louis, S. F. Ry. Co. v. Snaveley*, 47 Kan. 637.

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1008. TO MAKE PLEADING IN ACTION FOR CONVERSION OF LOGS MORE DEFINITE AND CERTAIN.

Now comes defendant herein and moves the court to require the plaintiffs to make their complaint more specific and certain by stating the time when, and place where, and the manner in which the logs alleged to have been converted by defendant were so converted, for the reason (set out).

1009. TO MAKE PETITION MORE DEFINITE AND CERTAIN IN ACTION ON ACCOUNT WHERE ITEMS ARE NOT SPECIFIED.

Now comes the defendant and shows to the court that the statements of the cause of action in plaintiff's petition filed herein are so indefinite and uncertain that the precise nature of the charge is not apparent, in the following particulars, to-wit: (specify in detail the particulars wherein the petition fails to properly specify).

That by reason of the indefiniteness and uncertainty of said petition as aforesaid, this defendant is in ignorance as to matters upon which he is called to defend in this cause; that by reason thereof he is unable to make satisfactory answer to said petition or to have any idea as to what evidence he will be called to meet at a trial of the cause made by said petition.

Wherefore he prays the court for a rule on the plaintiff herein requiring him to make his said petition more definite and certain in the respects herein above pointed out.

1010. TO MAKE PLEADING MORE DEFINITE AND CERTAIN IN ACTION FOR WORK AND LABOR AND MATERIALS WHICH FAILS TO SPECIFY ITEMS.

Now comes the defendant in the above entitled cause and moves the court to require the plaintiff herein to make his petition more definite and certain, and file therewith a bill of particulars of the work and labor alleged to have been done and performed and of the materials alleged to have been furnished by the plaintiff for defendant, together with the dates and items thereof for the following reasons: that there is not set forth in said petition the number of days' work and labor performed by plaintiff, nor what materials

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were furnished by plaintiff, but merely a lumping charge for work and labor done, which work and labor should be itemized by plaintiff, because the defendant is entitled in making its defense to said petition to know the items of labor and materials which plaintiff alleges in his petition to have done and furnished for defendant.

1011. MOTION TO STRIKE OUT IRRELEVANT OR REDUNDANT MATTER.

Now comes the defendant in the above entitled cause and moves the court to strike from the complaint (or petition) of plaintiff filed herein the paragraph (or sentence or phrase) as follows: (insert in full, or clearly designate parts to be stricken out); for the reason that said matter is irrelevant to any issue in this case, because (state why such matter is irrelevant or redundant).⁹

1012. TO STRIKE OUT AMENDED PETITION ON GROUND OF CHANGE OF CAUSE OF ACTION.

Now comes the defendant in the above entitled cause, and moves the court to strike out plaintiff's amended petition filed herein for the following reasons:

1. Because the same sets up a cause of action not embraced in the original petition and is a departure from the original cause of action, in this, that the said original petition was based upon the alleged negligence of the engineer,

⁹ Redundant or irrelevant matters inserted in any pleading, may be stricken out on motion of the party prejudiced thereby. *Atchison, T. & S. F. Ry. Co. v. Marks*, 11 Okla. 82.

Irrelevant and redundant matter, if struck out of a pleading, must be at the instance of the party who might be prejudiced thereby, and on motion made at the first opportunity, or he will be deemed to have waived the right, and it is too late, after reply filed, to move to strike from the answer. *Savage v. Challiss*, 4 Kan. 273.

Where certain words in a petition are immaterial and redundant, the court has a discretion to permit them to remain in the petition, or to order them to be stricken out. *Smythe v. Parsons*, 37 Kan. 79.

A motion to strike out portions of a pleading should designate with particularity the averments which it attacks. *Stuht v. Sweesy*, 48 Neb. 767.

The remedy for argumentativeness in a pleading is by motion, and not by demurrer. *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610.

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a fellow-servant, while the said cause of the amended petition is based upon the alleged and pretended negligence of the defendant.

2. Because the said amended petition would require entirely different and additional proof from the cause of action alleged in the original petition.¹⁰

1013. TO STRIKE OUT PARTS OF ANSWER.

Now comes the above named plaintiff and moves the court to strike out all that portion of the answer of defendant filed herein occurring after the first paragraph thereof, beginning on page with the words: ".....," and ending with the words: "....."

And for grounds of this motion plaintiff alleges:

1. Because the same is inconsistent with the petition (or complaint).

2. Because it attempts to add to the petition (or complaint) a cause of action not stated therein.

3. Because the matters therein stated are not material, pertinent or relevant to the allegations in the petition (or complaint), etc.

1014. TO STRIKE OUT PLEADING, BECAUSE OF SCANDALOUS AND IMPERTINENT MATTER.

Now come the defendants and move the court to strike out the plaintiff's petition (or the defendants' answer) herein for the following reasons:

1. Because said petition (or answer) contains scandalous matter.

2. The allegations therein are impertinent, redundant and immaterial.

¹⁰ A motion to strike a pleading from the files is not an appropriate method of testing its sufficiency. Such a motion may be used to eliminate an amended pleading which is a mere repetition of one held defective on demurrer. *Grand Lodge of the Independent Order of Odd Fellows v. Troutman*, 73 Kan. 35.

Where an amended petition is filed, the second and third counts of which are in conflict with the first, the proper motion is to strike out the inconsistent matter, or require the plaintiff to elect upon which cause of action he will proceed. *Keens v. Gaslin*, 24 Neb. 310.

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1015. MOTION TO ELECT.

Now comes C. D., defendant herein, and shows to the court that plaintiff's petition filed herein unites in the count thereof two separate and distinct causes of action, in this, namely—

or,

the count thereof unites two inconsistent causes of action, in this, namely—

or,

that the and counts thereof are inconsistent, in this, namely—

Wherefore defendant moves the court that plaintiff be required to elect on which count (or cause of action) he will proceed to trial.¹¹

1016. APPLICATION FOR CHANGE OF VENUE ON GROUND
THAT FAIR AND IMPARTIAL TRIAL CANNOT BE HAD
IN COUNTY.

Now comes the plaintiff (or defendant) in this cause and prays the court to grant him a change of venue herein, because plaintiff (or defendant) cannot have a fair and impartial trial in county, where this suit is now pending for the following reasons: (here set out specifically the facts upon which the applicant relies as to why he cannot have a fair and impartial trial).

Wherefore plaintiff (or defendant) prays that a change of venue may be granted to some other county where the conditions as hereinbefore set out do not exist.

(Affidavit.)¹²

1017. APPLICATION FOR CHANGE OF VENUE BECAUSE OF
DISQUALIFICATION OF JUDGE.

Now comes plaintiff (or defendant) in the above entitled

¹¹ The principle of election of remedies can be applied only where there are two or more co-existing remedies, and these must be so inconsistent that a party cannot logically choose one without renouncing all others. *City of Omaha v. Redick*, 61 Neb. 163; *State v. Bank of Commerce of Grand Island*, 61 Neb. 22.

¹² Statutory provisions for change of venue. *Comp. Laws of Okla.* 1909, sec. 5590; *Gen. Stat. of Kan.* 1909, sec. 5650; *Cob. Ann. Stat. Neb.* 1911, sec. 1060.

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cause and prays the court to grant him a change of venue because:

1. The judge of the court herein is interested in the litigation, in this that he is owner of a part interest in the land in litigation in this suit (or set out any other way in which the judge may be interested in the cause of action), or,

2. That the judge before whom this case is pending has been of counsel in the case and that prior to his election to the office of judge he was attorney for plaintiff (or defendant); or

3. Because the judge before whom this case is pending is related to the plaintiff (or defendant) in this that he is a brother of plaintiff (or defendant) (or state the relationship); or,

4. State any other ground upon which the judge may be disqualified to sit in the trial of the case.

(Affidavit.)

1018. MOTION FOR ORDER FOR SUBPÆNA *DUCES TECUM*.

Comes now the plaintiff in the above entitled cause and shows to the court that it is necessary for the trial of the above entitled cause on his part to have for the purpose of using as evidence certain (here set out and describe particularly books, papers or other documents desired) which are in the possession and under the control of

Plaintiff states that he has no way of obtaining said evidence for use in this cause without a *subpœna duces tecum* directing and commanding said to produce and have in court on the trial of said cause the papers hereinbefore described.

Wherefore plaintiff prays an order of court for a *subpœna duces tecum* directed to said commanding him to have and produce in said court on the day of, 19.., all of the books, papers and documents hereinbefore described.

1019. NOTICE OF MOTION FOR SUBPÆNA *DUCES TECUM*.

To the above named defendant or its attorney of record:

Take notice that on the day of, 19.., at

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the hour of o'clock .. M. or as soon thereafter as counsel can be heard a petition will be presented in said court asking for a *subpœna duces tecum* to be issued to directing said to have and produce in said court on the day of, 19.., the books, papers and documents in said motion particularly described, a copy of which is hereto attached.

1020. MOTION FOR ORDER FOR SUBPœNA DUCES TECUM TO THE DEFENDANT FOR PAPER IN ITS POSSESSION.

Come now the plaintiff in the above entitled cause, and shows to the court that it is necessary for the trial of the above entitled cause on his part to have, for the purpose of using as evidence, a certain receipt or release now in possession of the S. L. T. Co., defendant, and signed by U. A. for the sum of dollars, and given for money actually paid by the S. L. T. Co. to said U. A. in settlement and compromise by her of her suit, brought by her against the S. L. T. Co.; the suit brought in favor of said U. A. against S. L. T. Co. was brought to the term, 19.., of said court, for the recovery of dollars damages, for alleged personal injuries.

That plaintiff has applied to the counsel of the S. L. T. Co. for said receipt or release, or a copy thereof, and the same has not been furnished plaintiff, and that plaintiff has no way of obtaining the same without a *subpœna duces tecum*, directing and commanding said defendant to produce and have in court on the trial of said case, said release or receipt; that said release was dated on or about the day of, 19...

Wherefore your petitioner prays an order of court for a *subpœna duces tecum*, directed to said S. L. T. Co. and W. P., General Claim Agent of said company, commanding them to produce and have in said court on, ..., ..., 19.., said receipt or release.¹³

¹³ Plaintiff may compel the defendant by *subpœna duces tecum* to bring in papers and documents in his possession. *Marsh v. Davis*, 33 Kan. 326.

Subpœna duces tecum. Comp. Laws Okla. 1909, sec. 5844; Cob. Ann. Stat. Neb. 1911, sec. 1336; Gen. Stat. Kan. 1909, sec. 5917.

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1021. NOTICE OF MOTION FOR SUBPÆNA DUCES TECUM FOR DEFENDANT.

To the above named defendant, and its attorney of record:

Take notice, that on the day of, 19.., at the hour of o'clock .. M., or as soon thereafter as counsel can be heard, a petition, of which a copy thereof is hereto attached, will be presented in said court, in division thereof, asking for a *subpæna duces tecum* for an order on the defendant to produce and have in said court, in said division, a certain receipt or release mentioned in said petition, and at the time therein stated to be used as evidence in behalf of plaintiff on the trial of said case.

1022. DEMAND FOR COPIES OF INSTRUMENTS IN THE POSSESSION OF ADVERSE PARTY.

To, plaintiff, or, his attorney of record:

Request is hereby made upon you and each of you and you are hereby required to deliver to the defendant or his attorneys a copy of the (describe particularly the instrument, book or other writing of which a copy is desired) upon which the action in this case is founded or which you intend to offer in evidence at the trial thereof.¹⁴

1023. DEMAND UPON PLAINTIFF FOR PERMISSION TO INSPECT AND COPY BOOKS AND PAPERS.

(Title and venue.)

To E. F., plaintiff herein, or G. H., his attorney of record:

Demand is hereby made upon you for permission to inspect

¹⁴ Adapted from form in *Frazier v. Baptist Church*, 60 Kan. 404.

The notice must specify the writings with reasonable certainty so that the adverse party may be aware of what particular paper an inspection or a copy is desired. *Frazier v. Baptist Church*, 60 Kan. 404.

If the adverse party refuses to produce copies of the instruments demanded, the court may reject the papers when offered in evidence by the adverse party. *Kansas Ins. Co. v. Berry*, 8 Kan. (159) 114; *Board of Regents v. Linscott*, 30 Kan. 240, 266.

The rule of rejecting instruments when offered in evidence where demand has been made for copy does not apply to public records equally accessible to all parties. *Hammerslough v. Hackett*, 30 Kan. 57.

A copy of a private writing cannot be received in evidence over the objection of the adverse party unless proper foundation has been laid and the original is accounted for. *Peycke v. Shin*, 68 Neb. 343.

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and take a copy of the following described books, papers and documents in your possession or under your control which contain evidence relating to the merits of the action pending between the plaintiff and defendant herein; that the books, papers and documents which the defendant desires to inspect and take copies of are more particularly described as follows: (here designate particularly books, papers and documents desired).

You are further notified that if permission to inspect and take copies of the books, papers and documents hereinbefore described is not given within four days from the date of this notice that application will be made to the judge of the court in which this cause is pending praying for an order by said court allowing said inspection and copy of the books hereinbefore referred to.¹⁵

1094. MOTION FOR ORDER TO INSPECT AND COPY PAPERS, ETC.

Now comes C. D., defendant herein, and moves the court to grant an order upon E. F., plaintiff herein, to permit this defendant to inspect (designate papers) and take copies thereof, which (designate papers), as defendant is informed and believes, are now in the possession, or under the control of the plaintiff and not of the defendant; that the defendant is advised by his counsel, and verily believes that an inspection and copies of said (designate papers) are necessary to enable defendant to draft his answer in this cause (or necessary to prepare his case for trial) and that he cannot proceed to trial safely without such inspection and copies.

Defendant further says that said (designate papers) contain evidence relating to his defense herein and that inspection and copies are rendered necessary because of the following facts: (set out facts tersely indicating clearly the materiality of the papers as evidence, etc.).

Defendant further states that on the day of,

¹⁵ Statutory provisions with reference to inspection and copy of books and papers. Cob. Ann. Stat. Neb. 1911, sec. 1379; Comp. Laws of Okla. 1909, sec. 5888; Gen. Stat. Kan. 1909, sec. 5960.

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19.., he demanded of plaintiff herein permission to inspect and take copies of said (designate the papers) and that said demand was in writing, a copy of said demand being attached hereto, marked exhibit A and made a part hereof. That more than four days have elapsed since said demand was served upon plaintiff and that he has not complied with the demand, but has continually refused to comply with the same.

That defendant caused notice to be served upon plaintiff herein on the day of, 19.., that defendant herein would present this application to this court on the day of, 19.., at o'clock or as soon thereafter as he could be heard, praying that he be allowed to inspect said (designate papers) and take copies thereof. A copy of said notice with return of service thereon, is hereto attached and marked exhibit B.

Wherefore defendant prays to be allowed permission to examine the papers hereinbefore designated and take copies thereof for use in his defense in the above entitled cause.

(Affidavit.)

1025. NOTICE OF MOTION TO INSPECT AND COPY PAPERS, ETC.

(Title—venue.)

To E. F., the plaintiff herein, or G. H., his attorney of record:

Take notice, that I, the undersigned defendant herein, shall, on the day of, 19.., at o'clock .. M., or as soon thereafter as I can be heard, present an application to the court of county, ..., the court wherein the cause above entitled is pending, praying for an order directed to you, compelling you to permit me to inspect (designate papers) and take copies thereof which (designate papers) as the undersigned defendant is informed and believes are now in your possession or under your control and which (designate papers), as the undersigned defendant is advised by his counsel and verily believes, contain

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evidence relating to his defense in the above entitled suit, at which time and place you may appear if you so desire.

(Date.)

.....,
Defendant herein,
By,
His attorney.

1026. MOTION FOR ORDER TO PRODUCE BOOKS, PAPERS, ETC.

Now comes C. D., the defendant herein, and moves the court to grant an order upon E. F., the plaintiff herein, to produce at the trial of this cause, to be used in evidence by this defendant, the (designate the book or books to be produced) containing entries of transactions between the parties hereto, from the day of, 19.., to the day of, 19.., for the reason that this defendant is advised by his counsel and he verily believes that the said book (or books) kept by the plaintiff herein is (or are) material to the trial of this cause, since said book contains (or contain) entries, as he has good reason to believe and does believe, touching (set forth facts tersely showing that entries are material).

(Affidavit.)

1027. MOTION TO SUPPRESS A DEPOSITION.

And now comes plaintiff, by K. & F., attorneys, and moves the court to suppress the deposition of B. O. D. taken herein on the part of M. E. H., one of the defendants, for the following reasons, viz.: Because the notice to take depositions was served on plaintiff's counsel on the day of, 19.., the district court of county then being in session, having commenced in regular session on the day of, 19.., and having (except Sundays) been continuously since then in session; that the above stated action being on bar docket of said term and fixed for, 19.., and having been continued from preceding term by the defendant H; and plaintiff's counsel being resident members of the bar of county district court, and having causes in the bar docket for trial that precluded them or either of them from attending at the

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time and place named in the notice to take depositions, as will be seen by the affidavit of R. H. K. hereto attached, marked "exhibit A," and made a part hereof.¹⁶

1028. SAME—ANOTHER FORM.

Now comes the defendant and moves the court to suppress the deposition of, a witness, taken at on the day of, 19.., by the plaintiff and filed herein on the day of, 19.., for the reason that the notice to take said depositions stated that it was to be taken at street in the city of on the day of, 19.., that the deposition as filed herein shows that it was not taken at street but that it was taken at the office of street in the city of, and said deposition further shows that it was not taken on the day of, 19.., but one day later, on the day of, 19... (Set out any other cause or reason for the suppression of the deposition, that the notice was not served in time, or any other reason why it should not be used in evidence.)

1029. TO SET ASIDE THE DISMISSAL OF AN ACTION FOR WANT OF PROSECUTION.

G. S. M., first being duly sworn, upon his oath states that he is one of the plaintiffs in the above-entitled action, and that the plaintiffs have a just and valid claim against the defendant, which they will be able to prove if the order in

¹⁶ Form in *Northrup v. Hottenstein*, 38 Kan. 263.

Motion to suppress a deposition should set out clearly the ground of objection. *Neosho Valley Investment Co. v. Hannum*, 63 Kan. 621.

A motion was made to quash a deposition because the notice specified that it would be taken at the office of "Dan. Ray," whereas the deposition showed that it was taken at the office of Daniel E. Wray. It was held that "Dan" is an abbreviation of "Daniel" and that "Ray" and "Wray" are *idem sonans*, and that the omission of the middle letter is immaterial; and that Wray being identified in the notice as an attorney at law of the place where the deposition was to be taken, and there being no claim that there was any other person of that name or having one sounding like it in that place, the opposing party could not have been misled, and that the overruling of the motion to quash the deposition was not error. *Sparks v. Sparks*, 51 Kan. 195.

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the above entitled action may be set aside dismissing the same for want of prosecution, and a trial granted. Affiant further states that he was ready for trial on the day of, 19.., and had reached P. in the morning of said day of, 19.., on their way to I. for trial of said action, and being informed by their attorney that the court was engaged in the trial of the county-seat case, and it would be impossible to try said action on said day, and relying on said information, said plaintiffs' affairs needing their attention at home, returned home to return the next day. That they had no knowledge or information that said action would be tried on the night of the, or they would have been at I. at said time for trial of said action; that they reside miles from I., and that they received information through one S. claiming to have been sent by W. W. N., about or o'clock, that said case would be tried that night. After getting said information plaintiffs got ready as soon as possible and started for I., arriving there about in the morning of the, 19..; that at the last term of this court the plaintiffs were in attendance days, waiting for a trial of said action also, plaintiffs had been in attendance two days of this court, waiting for this action to be set for trial.¹⁷

1030. MOTION TO VACATE AND SET ASIDE A JUDGMENT.

Now come the defendants in this cause and appearing specially for the purpose of this motion only, move the court to vacate and set aside the judgment rendered herein for the following reasons:

1. The court had no jurisdiction of the subject-matter of this action.
2. It had not jurisdiction of the persons of the defendants, or either of them.
3. Neither of said defendants ever appeared in said action and the summons in said action was served upon them in county, Kansas, as will fully appear from the records and files in said cause.

¹⁷ Form in Chinn v. Bretches, 42 Kan. 316.

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4. Said judgment is absolutely void upon the face of the record, as no appearance was ever made in said cause or summons served upon said defendants or either of them in county, Kansas, as appears fully from the record in said cause.¹⁸

1031. MOTION TO SET ASIDE A JUDGMENT ON THE GROUND THAT NO PROPER SERVICE WAS HAD.

Now comes the defendant, O. G., by his attorneys, W. & W., and moves the court to set aside the judgment rendered herein on the day of, 19.., in favor of the plaintiff herein, for the reason that no proper service was had on the defendant, O. G., in said suit.¹⁹

1032. MOTION TO OPEN A JUDGMENT OBTAINED BY DEFAULT WHERE THE PARTY WAS SERVED BY PUBLICATION.

Now comes defendant in the above entitled cause and states that on the day of, 19.., plaintiff instituted suit in the district court of the county of and State of against, the defendant, and filed his affidavit in accordance with section of the statutes and an order of publication was issued by the district court of county and state aforesaid; that as shown by the proof of the publication of the order the notice of publication to this defendant was printed in, a newspaper printed in the county and state aforesaid as required by statute.

That thereafter said cause was called for hearing and this defendant failing to appear judgment was rendered against him in said cause as prayed for in the petition of the plaintiff on the day of, 19...

Defendant states that he did not see said notice of publication and did not receive any information or knowledge of the pendency of the action against him until the day of, 19.., about two years after the date on which said judgment was rendered against him by default. (If affidavits are submitted in support of the allegation of no no-

¹⁸ Form in Comm'rs of Kearny Co. v. Rush, 44 Kan. 231.

¹⁹ Form in Green v. Green, 42 Kan. 654.

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tice during the pendency of the action, refer to same here.)

Defendant states that he has a meritorious defense to said cause of action and presents herewith his answer to the petition of the plaintiff in said cause. Defendant further states that he is ready and willing to pay the costs that have already accrued in said cause if ordered and required by the court to pay said costs.

Defendant further states that on the day of, 19.., he served upon the plaintiff notice that he would on the day of, 19.., present to this court his motion asking for the opening of this judgment and that he be allowed to make his defense herein. A copy of said notice served upon the plaintiff, together with the proof of service of the same, is hereto attached and marked exhibit A.

Wherefore defendant prays that said judgment may be opened and that he may be allowed to file his answer presented herewith and to appear in said cause and defend.

1033. NOTICE OF PRESENTING MOTION TO OPEN JUDGMENT BY DEFAULT.

To C. D., plaintiff herein:

Take notice, that on the day of, 19.., I will present to the judge of the court of county, and State of, a motion asking the court to set aside the judgment heretofore rendered in the above entitled cause by default by, defendant, and that said case may be opened and defendant given an opportunity to file his answer and defend therein. A copy of said motion is hereto attached.

1034. MOTION AND AFFIDAVIT TO OPEN A DECREE ENTERED ON CONSTRUCTIVE SERVICE.

I. R., being first duly sworn, upon her oath says: That she is one of the defendants in the aforesaid cause, and that she is one of the heirs at law of A. G., Sr., deceased, and that during the pendency of the aforesaid action against her and the other defendants herein, she had no actual notice thereof in time to appear in court and make her defense to this

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action; that she is one of the daughters of the said A. G., Sr., and that she had no knowledge whatever of the pendency of said action or of the rendition of a judgment or decree therein until long after the rendition of such judgment and decree in this cause; that she is the owner of a interest in the undivided half of the real estate described in the petition in this action, known and described as (here describe) situate upon and being a part of the (here describe) in D. county, Nebraska, as a daughter and one of the heirs at law of A. G., Sr., deceased; that no other service was made or attempted to be made upon this affiant in this cause than by publication in a newspaper, and that five years have not elapsed since the rendition of the judgment and decree in this cause; that this affiant desires to have the judgment and decree rendered in this cause opened, and that she be let in to defend upon giving notice as required by the statutes of the State of Nebraska, to the plaintiff in this cause, and upon complying with the orders of the court which may be made in this behalf as to the payment of costs, and upon filing a full answer to the petition in this cause.²⁰

1035. MOTION TO SET ASIDE A JUDGMENT BY DEFAULT.

Comes now the defendant and moves the court to open up and set aside the decree and default heretofore entered in this case and permit the defendant to interpose his defense for the following reasons, to-wit:

1. That the plaintiffs' petition fails to state a cause of action against the defendant.
2. That defendant has a good, valid, meritorious, and complete defense to the cause of action set forth in the plaintiffs' petition, as is shown by the answer herewith filed, and which defense he did not interpose for the reason that prior to the entering of said decree the plaintiffs agreed with the defendant that they would dismiss their said action, which agreement and promise the defendant relied upon.
3. Said decree was entered in the absence and without the knowledge or consent of the defendant, and in violation of

²⁰ Form in Gaslin v. Ritzel, 33 Neb. 739.

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the plaintiffs' promise that they would dismiss their said action.²¹

1036. MOTION TO SET ASIDE DEFAULT.

And now comes the defendant and moves the court here to set aside the default herein for the reasons following:

1. Because the said default has not yet been entered upon the journal and records of this court.

2. Because said defendant and the attorney of the plaintiff were in good faith making every effort to settle the matters in controversy in this cause without further litigation or costs, and that the defendant believed, and thought he had good reason to believe, that no default would be by the plaintiff taken against this defendant pending negotiations for said settlement, and said negotiations are still pending, as will more fully, and at large appear from the affidavit of the defendant herewith filed and made part of this motion.

3. That this defendant, believing that no default would be taken against this defendant, and that the said matter in dispute would and could be settled without further suit, he delayed filing his answer.

4. That this defendant has a good and meritorious defense as to dollars of the amount claimed by the plaintiff.

5. The defendant prays that the said default be set aside, and that the defendant be allowed to file his answer herein.²²

1037. MOTION TO VACATE REVIVOR OF JUDGMENT.

Comes now the above named defendant, J. McC., and moves the honorable court to set aside and vacate the order of revivor made on the day of, 19.., for the following reasons:

1. That no such judgment was ever rendered against this defendant as that recited in the order of revivor complained of by this defendant.

²¹ Form in Gardels v. Kloke, 36 Neb. 493.

²² Form in Sang v. Lee, 20 Neb. 667.

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2. That no service of motion, process, writ, or summons, was ever made upon the defendant as required by law.

Wherefore, the defendant asks that said order of revivor be held for naught, and that the same be vacated and set aside as void for the reasons herein recited.

A. B. H., Attorney for defendant.

Plaintiff by his attorney hereby waives time and asks that this motion be passed on by the court on this day of, 19...

J. A. W., Attorney for Plaintiff.²³

1033. MOTION FOR NEW TRIAL.

Now comes, plaintiff (or defendant) herein, and moves the court to set aside the judgment rendered in this case and to award him a new trial and for grounds of said motion plaintiff (or defendant) says:

(Set out either in the language of the statute or in appropriate language the errors complained of which must come within one of the eight grounds specified in the statute.)²⁴

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.²⁵

²³ Form in *Wilson v. McCornack*, 10 Okla. 180.

²⁴ Motion for new trial must set out all errors which the party expects to rely upon and if not presented in the motion they will be considered as waived. *McCormick v. Drummett*, 9 Neb. 384; *Manning v. Cunningham*, 21 Neb. 288; *Boyd v. Bryan*, 11 Okla. 56; *Glaser v. Glaser*, 13 Okla. 389.

It is not necessary to use the language of the statute as a ground for new trial if definite and specific causes are properly alleged coming within one of the statutory grounds. *Glaser v. Glaser*, 13 Okla. 389; *Marbourg v. Smith*, 11 Kan. (554) 417.

The errors complained of must be distinctly set forth. *Dorrington v. Meyer*, 8 Neb. 211; *Dunham v. Courtney*, 24 Neb. 627.

²⁵ Insufficient assignment of error. An assignment "Irregularity in the proceedings of the court" is too general to be of any avail. *Tomer v. Densmore*, 8 Neb. 384.

So, "irregularities in the proceedings of the court by which defendants were prevented from having a fair trial" are too indefinite. *Lowrie v. France*, 7 Neb. 191.

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2. Misconduct of the jury or prevailing party.²⁶
3. Accident, or surprise, which ordinary prudence could not have guarded against.²⁷
4. Excessive damages, appearing to have been given under the influence of passion or prejudice.²⁸
5. Error in the assessment of the amount of recovery

Objection to the competency of juror must be raised in the motion for new trial. *Mengedoht v. Dorn*, 48 Neb. 880.

The affidavit in support of a motion for new trial alleging disqualification of a juror must show that the rights of the aggrieved party have been prejudiced and that such party did not have full knowledge of such facts when the jury was empaneled. *Berry v. Smith*, 2 Okla. 345.

²⁶ **To obtain new trial for misconduct of prevailing party** the motion must be sustained by affidavit showing alleged charge to be true. *A. T. & S. F. Ry. Co. v. Rowan*, 55 Kan. 270.

Misconduct of the prevailing party, as ground for new trial is not confined to something occurring at the trial, it may include acts amounting to misconduct which though occurring before operate at the trial. *Phares v. Krhut*, 76 Kan. 238.

Improper remarks of counsel in argument of case may be made ground of new trial under the second clause of the statute, but the proper objection must be made by the party at the time and the record must show what was said by counsel. *A. T. & S. F. Ry. Co. v. Rowan*, 55 Kan. 270; *Huckell v. McCoy*, 38 Kan. 53.

Negligence of the party or his attorney, or mismanagement of his attorney of the defense, either through design or ignorance is not ground for new trial. *Holderman v. Jones*, 52 Kan. 743.

²⁷ **An affidavit for new trial because of loss of deposition** should set out the substance of the testimony of the witness in the deposition. *Felton v. Moffett*, 29 Neb. 582.

Surprise as a ground for a new trial must be such as could not have been guarded against with ordinary prudence, and where the alleged surprise is with respect to the testimony of a witness, it must be shown that such testimony was not true, or that it would be different upon a new trial. *Osborne v. Young*, 28 Kan. (769) 549.

²⁸ **The mere fact that damages are excessive is not a ground for new trial.** They must appear to have been given under the influence of passion or prejudice. *M. K. & T. Ry. Co. v. Weaver*, 16 Kan. 456.

That a verdict was the result of prejudice is a ground for new trial. *Drumm v. Cessnum*, 58 Kan. 321.

An assignment "that the verdict was excessive, contrary to evidence, and given under the influence of passion and prejudice," is sufficient to raise a point of error under the fourth ground of the statute. *A. T. & S. F. Ry. Co. v. Rowe*, 56 Kan. 411.

whether too large or too small, where the action is upon a contract, or for the injury or detention of property.²⁹

6. That the verdict, report or decision is not sustained by sufficient evidence or is contrary to law.³⁰

7. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.³¹

²⁹ **Errors in the assessment of the amount of recovery** cannot be considered, unless such ground of error is alleged in the motion for new trial. *Southwestern Cotton Seed Oil Co. v. Bank of Stroud*, 12 Okla. 168.

The assignment in a motion for new trial that the finding is not sustained by the evidence does not, in an action on contract, raise the question of error in the assessment of the amount of recovery. *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590; *Hammond v. Edwards*, 56 Neb. 631.

An assignment of error in a motion for new trial "That the verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice or undue means," does not raise the question of error in assessment of the amount of the recovery. *Beavers v. Mo. Pac. R. Co.*, 47 Neb. 761.

³⁰ An assignment of error that the verdict is against "the great weight of evidence," is not a proper assignment. The assignment must be that the verdict is not sustained by sufficient evidence. *Barmby v. Wolfe*, 44 Neb. 77.

³¹ **Motion on ground of newly discovered evidence need not be verified** nor need it be sustained by an affidavit filed at the same time. The affidavit sustaining it may be presented at the hearing of the motion. *St. Louis and S. F. Ry. Co. v. Gaston*, 67 Kan. 217.

The motion should be supported by the affidavits of the witnesses who will give the newly discovered evidence. *Huster v. Wynn*, 8 Okla. 569.

Four things must be shown by the motion. First, that the testimony was newly discovered. *Sexton v. Lamb*, 27 Kan. 432; *Strong v. Moore*, 75 Kan. 437.

Second, that it could not with reasonable diligence have been obtained at the time of the trial. The affidavit must set out and state what particular efforts the party has made to discover the testimony before the trial. *Tomer v. Densmore*, 8 Neb. 384; *Fleishem Mercantile Co. v. Gillespie*, 14 Okla. 143.

It must be shown that the newly discovered evidence was not known to the party at the time of trial. *Thisler v. Miller*, 53 Kan. 515; *Morgan v. Bell*, 41 Kan. 345.

Motion for new trial on the ground of newly discovered evidence should show that the applicant used due diligence to procure and pre-

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8. Error of law occurring at the trial, and excepted to by the party making the application.³²

1039. APPLICATION FOR NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE.

And now comes plaintiff and applies for a new trial on the ground of newly discovered evidence, and bases this its application upon the following facts:

sent the evidence on the trial and the facts constituting the diligence must be stated. *Twine v. Kilgore*, 3 Okla. 640; *Burns v. Vaught*, 27 Okla. 711.

It is not sufficient to allege that the plaintiff "has learned, since the term of the court and the trial," certain matters constituting the grounds for a new trial; the allegations must be affirmatively stated, and not upon information. *Axtel v. Warden*, 7 Neb. 186.

Third, that it is not cumulative. *Olathe v. Homer*, 38 Kan. 312.

If the newly discovered evidence is merely cumulative it will not be sufficient to warrant a new trial. *Huster v. Wynn*, 8 Okla. 569; *Harvey v. Territory of Okla.*, 11 Okla. 156; *Twine v. Kilgore*, 3 Okla. 640; *State v. Stickney*, 53 Kan. 308.

Fourth, that if it had been introduced it would, with reasonable probability, have compelled a different conclusion. *Sexton v. Lamb*, 27 Kan. 432; *Gran v. Houston*, 45 Neb. 813; *Huster v. Wynn*, 8 Okla. 569; *Morgan v. Bell*, 41 Kan. 345.

It must show that the evidence is material. *Olathe v. Horner*, 38 Kan. 312; *Strong v. Moore*, 75 Kan. 437.

³² "Errors of law occurring at the trial and excepted to by the party making the application" embrace any objection and exception properly made and saved during the progress of the trial and include exceptions to the giving of instructions to the jury. *Glaser v. Glaser*, 13 Okla. 389.

Exceptions to the admission or exclusion of testimony are presented for review by motion for new trial under the eight statutory grounds for new trial. *Glaser v. Glaser*, 13 Okla. 389.

Assignment of error in a motion for new trial, as to admission or rejection of testimony, must point out specifically the error relied on. *Shaffer v. Maddox*, 9 Neb. 205.

An assignment of error "because the court erred in excluding proper evidence from the jury, offered by the defendant, to which ruling of the court the defendant at the time excepted, is too indefinite." *Uhl v. Robison*, 8 Neb. 272.

Objections to giving of instructions must be specifically made in a motion for new trial. *Keens v. Robertson*, 46 Neb. 837; *Hamilton v. Goff*, 45 Neb. 339.

Error in giving instructions cannot be taken advantage of under motion for new trial unless exceptions were taken at the time the instructions were given. *St. Louis and S. F. Ry. Co. v. Werner*, 70 Kan. 190.

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1. The verdict in this case was secured in part by the false and untrue testimony of defendant, that the mare in controversy was at the time it was taken from G. to P. county, and placed in defendant's possession, and at the time each of plaintiff's mortgages were executed, black in color and not brown. Since the trial of said cause, and since the adjournment of the term of this court at which said trial was had, plaintiff has discovered that he can prove that the color of the said mare was brown and not black at said time it was taken to P. county from G. county, by the testimony of (set out names of witnesses). Each of said witnesses above named are residents of G. county, Nebraska. If a new trial is granted the testimony of each of them can and will be procured for use on trial.

2. Said verdict was also in part induced and secured by the false and untrue testimony of defendant, that defendant did not himself take said mare in controversy from G. county to P. county, but that one C., the owner of said mare, brought her to P. county, and delivered her to said defendant to keep and train for hire. Since said trial and since the adjournment of said term of this court, plaintiff has learned the fact to be that said defendant came to G. county himself and got said mare out of the pasture of one G. W. K., in the night time, surreptitiously, and wrongfully, and took her to P. county, himself. This fact plaintiff can prove by the testimony of said G. W. K., F. M. and others. Plaintiff can also prove by the testimony of (name witnesses) that during the years, ..., and up to, 19.., L. C. C. had no other mare colt in his possession, except the one that was known as "Victoria," sired by G., which is now the mare in controversy, and that she was taken from G. county, to P. county, in, 19... Plaintiff can also prove by the testimony of the witnesses last above named and others that said L. C. C. repeatedly said in their presence that said mare colt called "Victoria" was mortgaged to the plaintiff, and that defendant owed him, and he had helped defendant, who in turn agreed to keep and train said mare without charging said C. anything for it.

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Plaintiff further avers that all the above facts are material and important to plaintiff's case. The main controversy in this case is to establish the identity of the mare in controversy as the same animal that was formerly kept in G. county, Nebraska, by L. C. C., under the name "Victoria." The fact that her color was brown and that she was the only mare colt owned and held in possession by L. C. C., and that she was surreptitiously taken out of G. county, to P., by or with the assistance of the defendant are all very material and important facts to establish plaintiff's claim.

Plaintiff further avers that before the trial of this cause great diligence was used by plaintiff to discover this and any other important testimony material to its case. That prior to said trial plaintiff sent its agents to the vicinity of where L. C. C. lived in G. county, during, ... and, who there made search for all material testimony in the case. That by reason of the natural reticence of people, including the witnesses above named, and their desire to avoid being brought into court as witnesses, said agents were not able to learn of the knowledge of the above facts possessed by said witnesses. But after the trial of this case said witnesses, learning that injustice had been done the plaintiff by the verdict, have finally informed the officers of the plaintiff of their knowledge of the above facts, and of their willingness to testify to said facts as above stated. Prior to said trial plaintiff made inquiry for witnesses who could testify to the above facts, living in the vicinity of said former residence of said C., repeatedly without being able to discover them. By reason of the inability of the plaintiff to discover the above testimony before said trial, and before the adjournment of said term of court, great injustice has been done plaintiff by said verdict. If a new trial is granted herein, the testimony of each of the above named witnesses will be procured upon the points above mentioned for use on the further trial of this cause.

Wherefore plaintiff prays that the court will grant a new trial herein to the end that justice may be done.³³

³³ From form in record in *German National Bank v. Jacob Edwards*, 63 Neb. 604.

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1040. MOTION FOR CITATION.

..... being duly sworn on his oath states that he is president of the A. C. M. Co., a corporation, and that on the day of, 19.., a judgment was rendered in the court of L. county in favor of the A. C. M. Co. against B. F. R. for the sum of dollars and costs of suit, taxed at dollars, with interest at per cent. per annum until paid; and an execution was issued thereon and placed in the hands of the sheriff of L. county for service. That the sheriff returned said execution unsatisfied; that the amount of said judgment, together with interest and costs, now amounts to dollars.

Affiant further states that B. F. R. is a resident of L. county, where said judgment was rendered, and that the said B. F. R. has property which he unjustly refuses to apply towards the satisfaction of said judgment.

Wherefore affiant prays this court for an order requiring B. F. R. to appear before this court, at a time to be fixed by this court to undergo an examination under oath touching his means and ability to satisfy this judgment.³⁴

1041. MOTION TO QUASH SUMMONS.

Now comes the F. B. Company, appearing specially and for the purpose of this motion only, and moves the court now here to quash, vacate and set aside the pretended summons and the pretended service thereof in the above-entitled action, for the following reasons, to-wit:

1. Because there has been no service of summons upon the said F. B. Company.

2. Because there has been no service of summons upon the said F. B. Company, or any authorized agent of said company.

3. Because said action was improperly instituted in N. county, Kansas.

4. Because said pretended summons was improvidently issued.

³⁴ Adapted from facts in *Ryland v. Arkansas City Milling Co.*, 19 Okla. 345. For additional form see form No. 441.

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5. Because said summons and the return thereof are void and of no effect, and the court has not by the issuance of such summons obtained any jurisdiction whatever over said F. B. Company.³⁵

1042. MOTION TO QUASH EXECUTION.

Now comes E. F., defendant herein, and moves the court to quash the execution heretofore issued in this cause by the clerk of this court, in favor of C. D., the plaintiff herein and against the defendant, on the day of, 19.., and to recall and declare the same null and void, for the reason that said execution (state grounds of motion, as that the execution is defective in form or substance, pointing out particulars).

1043. MOTION TO SET ASIDE A SHERIFF'S SALE AND QUASH EXECUTION.

Now comes defendant and moves the court to set aside the sheriff's sale and quash the execution in the above entitled cause, for the following reasons:

1. Because the court erred in not sustaining defendant's motion to quash the execution issued out of the clerk's office in favor of the plaintiff and against defendant.

2. Because there is no judgment upon which the execution on which the sale was made can be based.

3. Because the judgment mentioned and described in said execution was dissolved by the appeal which the defendant took in said suit.

4. Because the judgment against defendant, after defendant's appeal to the circuit court, was a nullity and was insufficient to authorize execution, out of the clerk's office.

5. Because there was no notice of the issuance of said execution served upon the defendant.

6. Because said execution was issued without authority of law and is irregular and void.

³⁵ Form in Federal Betterment Co. v. Reeves, 73 Kan. 107.

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1044. MOTION TO SET ASIDE A CONFIRMATION OF SALE OF REAL ESTATE MADE BY VIRTUE OF A DECREE OF FORECLOSURE.

And now comes the said defendant J. L., and objects to the confirmation of the sale herein had, and moves the court to set the same aside for the following reasons:

1. That the property sold herein was appraised far below its actual value, and so far below its value as to show fraud, collusion, partiality, or incompetency on the part of the appraisers, as is shown by the affidavits of J. L., C. E. C., T. P. and J. W., hereto attached.

2. That the property was sold at a grossly inadequate price, in this, that the same is, and at the time of the sale herein was, well worth the sum of dollars, and is shown by affidavits hereto attached.

3. That there is error and irregularity in said sale in this that the decree of foreclosure in said case (here set out irregularities complained of in the decree).

4. And the defendant alleges further error and irregularities of said sale in relation to that part (here set out irregularities complained of in regard to the sale).

5. There is further irregularity in the proceedings of said sale, in this, that no money was paid by the purchaser, M., to the sheriff, with which to pay the amounts due to the other beneficiaries in said decree; that in fact no money at all was paid or offered by the purchaser, M., at said sale to any one for any purpose.

6. That the advertisement of sale published herein was defective and misleading, in this, that the farm property offered for sale was one section by government survey; that the advertisement was such as to advise people that the said section should be sold in bulk; that if said section had been advertised and offered for sale by government subdivisions of a section, it would have sold to a much better advantage and for a larger amount.

7. The advertisement herein is not in accordance with the appraisement herein, in this, that the said section is appraised in government subdivisions, to-wit, quarter sections, while in

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the advertisement the entire section is offered in bulk, whereby persons desiring to buy quarters or lesser subdivisions were misled and prevented from attending the sale.

8. That the proceedings by which the said sale were had and the sale itself are in other respects informal, incomplete and insufficient, whereby material injury has resulted to the said defendant. All of which will more fully appear by inspection of the files in this case and affidavits herewith filed.³⁶

1045. OBJECTION TO CONFIRMANCE OF SHERIFF'S SALE OF REAL ESTATE UNDER EXECUTION.

Now comes the defendant in this cause and objects to the confirmance of the sale of the real estate as shown by the report of the sheriff for the following reasons:

1. That the property was exempt to the defendant W. as a homestead.

2. That, after the levy of the execution and before the sale, said defendant served a written notice upon the sheriff holding the writ that she claimed the real estate as a homestead, and that the same was, therefore, exempt from sale on execution, and that the judgment creditor failed to have her homestead right determined.³⁷

1046. MOTION TO SET ASIDE AN ORDER SUSTAINING DEFENDANT'S MOTION TO SET ASIDE A SALE, ETC.

Now at this day comes above named plaintiff and prays the court to set aside its order or judgment sustaining defendant's motion to set aside the sale made in the above cause, and to grant a new trial for the reasons:

1. The order and judgment of the court is against the evidence introduced in the cause.

2. The order and judgment are against the law.

³⁶ Form in *Miller v. Lanham*, 35 Neb. 886.

A motion to set aside a sale, or order confirming a sale of real estate, should point out specifically the errors complained of. General objections are too indefinite to be considered. *Johnson v. Bemis*, 7 Neb. 224.

³⁷ Form in *Chamberlain Banking House v. Zutavern*, 59 Neb. 623.

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1047. MOTION TO DISSOLVE RESTRAINING ORDER.

Now comes the defendant in the above entitled cause and moves the court to set aside and dissolve the order heretofore made in this cause enjoining and restraining defendant (here set out particulars in which the restraining order was made) for the reasons:

1. That said restraining order was improvidently and wrongfully granted.

2. That said plaintiff is not entitled to the relief prayed for in its petition.

3. That the petition filed by the plaintiff in said cause does not state facts sufficient to constitute a cause of action against the defendant.³⁸

1048. MOTION TO SET ASIDE RESTRAINING ORDER.

Comes now said defendant, The M. and K. T. Co., and moves the court to dissolve and set aside the restraining order heretofore granted herein, for the reason that the petition herein does not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle plaintiff to the relief therein prayed, or to any relief, and shows no right in said plaintiff to maintain this suit.³⁹

1049. MOTION FOR ORDER OF AMERCEMENT AGAINST A SHERIFF.

Now comes the plaintiff in said cause, and moves the court for an order of amercement against S. M., sheriff of L. county, in two causes of action, wherein T. C. C. is plaintiff, and E. H. is defendant, for the reason that executions in said sheriff's hands were not returned by him within the time and manner provided by law, and the sheriff neglected and refused to levy the same upon property of the said H., when requested so to do by said plaintiff.

The amount of amercement demanded is the sum of dollars, being the amount and interest due upon said judgments and executions.⁴⁰

³⁸ Adapted from facts in *McLain Land Co. v. Kelly*, 11 Okla. 26.

³⁹ Form in *State v. Missouri & Kansas Telephone Co.*, 77 Kan. 774, 775.

⁴⁰ Form in *Crooker v. Melick*, 18 Neb. 227.

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1050. SAME—ANOTHER FORM.

Now comes the defendant F. K. and moves the court to amerce and order J. W. P., as sheriff of L. county, to pay to said F. K. or his attorney of record the following sums of money, viz.:

1. The sum of dollars, retained by the said sheriff out of the proceeds of the sale of the (here described) sold by said sheriff on execution in this action, and the sale of which land so made was by this court duly confirmed and approved. Said sheriff claims to withhold said dollars to pay the costs in this action prior to the proceeding of F. K. in the supreme court on error, which costs are adjudged to be paid by E. H. S. and E. M. S., which judgment for costs is in full force and unreversed.

2. The sum of dollars, retained by said sheriff out of the proceeds of the sale of said land to pay the amount claimed as taxes on said land for the years 19.., 19.. and 19.. which was sold to one F. A. O., and a certificate of sale issued to said O. and by him assigned to E. B., the purchaser of said land at said sheriff's sale. The consideration of said assignment was less than the face value of said tax-sale certificate and the accrued interest thereon. After said sheriff's sale the sum of dollars was paid by said sheriff to the county treasurer of L. county, over the objection of said K., and with the knowledge of said sheriff that the purchaser, Mrs. B., had agreed to pay the taxes, and pay the bid of dollars for said land before the sale was confirmed. After the confirmation so procured, a motion was filed by said B. for an order of this court to direct said sheriff to pay to her said taxes on the land so sold to O., which motion was overruled, after which said sheriff did pay said sum of dollars out of said proceeds to said county treasurer and took a redemption certificate thereon for the years 19.., 19.. and 19.., over the objection and protest of said K., which sum of dollars was then paid by said county treasurer to E. B., all of which was with the knowledge of said sheriff of the agreement of said B., and over the objection of said K. Demands for the payment to said K. of said sums of

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money have been made upon said sheriff, and payment by him refused.

Wherefore said F. K. asks that said sheriff be amerced, and required to pay said sums, amounting to dollars, with interest at per cent. from , 19.., and for the costs of this proceeding.⁴¹

1051. MOTION FOR JUDGMENT ON THE PLEADINGS.

Comes now the said plaintiff, the State of, and exhibits to the court the petition of the said plaintiff, the answer of the said defendant, and the reply of the plaintiff thereto, and shows to the court that the said petition of the plaintiff alleges and sets forth a good and valid cause of action against said defendants; and that all the allegations, averments and statements of the said answer are not sufficient to constitute any defense against the said cause of action of the plaintiff; and that it appears from the said petition and answer that the said defendant has no good, valid and sufficient defense to the said cause of action alleged in plaintiff's petition; and that it appears from all the pleadings in said cause that the said plaintiff is entitled to judgment as prayed for in its petition.

Now, therefore, said plaintiff moves the court for judgment in this cause upon the pleadings as prayed for in plaintiff's petition.⁴²

1052. SAME—ANOTHER FORM.

Now comes C. D., plaintiff herein (or defendant), and moves the court to render judgment in favor of C. D. plaintiff herein (or defendant) and against E. F. defendant herein (or plaintiff) on the pleadings. And for grounds or reasons for this motion plaintiff (or defendant) says (specify grounds).⁴³

⁴¹ Form in *Kothman v. Prest*, 34 Kan. 179.

⁴² Form in *Board of County Commissioners of Day County v. State of Kansas*, 19 Okla. 375, 390, 391.

⁴³ **Judgment on pleadings.** Where a petition is filed by the plaintiff, and the defendant by his answer, in addition to the general denial, pleads facts which would warrant the granting of affirmative relief, and

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1053. MOTION FOR JUDGMENT *NON OBSTANTE VEREDICTO*.

Now comes plaintiff herein and moves the court to enter judgment in said action in favor of this plaintiff and against the defendant herein, notwithstanding the verdict of the jury rendered herein in favor of said defendant. And for grounds or reasons for this motion plaintiff says: (allege reasons).

1054. MOTION FOR JUDGMENT ON SPECIAL FINDINGS OF THE JURY.

Come now the defendants in the above entitled cause, and move the court to enter judgment for the defendants on special findings of facts of the jury in said cause, for the sum of dollars, the same being the amount of damages found by the jury as the value of the premises described in the pleadings in this cause accruing after , 19. ., for the reason that said special findings establish the fact that the plaintiff herein entered on said premises and took possession thereof on the day of , 19...⁴⁴

1055. MOTION TO RETAX COSTS.

Now comes the defendant, and moves the court to retax the costs in this case and tax them against the plaintiffs, instead of the defendant, and render judgment therefor against said plaintiffs, for the reason that this action is an appeal

after filing such answer, and, before a reply is filed, the plaintiff by leave of court dismisses his action, the defendant will be allowed to pursue his remedy for affirmative relief as set up in his answer, and on a motion for judgment on the pleadings for the reason that the allegations of the answer asking for affirmative relief are undenied, the court should either sustain the motion, or rule the plaintiff to file a reply to the affirmative part of the answer so that the issue may be raised and tried by the court. *Brown v. Massey*, 19 Okla. 482.

Where the answer of defendant admits the cause of action stated in plaintiff's petition, and its averments are insufficient to constitute a defense, the court may, upon motion of plaintiff, allow and enter judgment in his favor upon the pleadings. *Hutchison v. Myers*, 52 Kan. 290.

A motion for judgment should be denied where the pleadings raise a question of fact to be tried. *Noland v. Owens*, 13 Okla. 408; *Fouts v. Pettigrew*, 68 Kan. 289.

⁴⁴ Form in *Richardson v. Penny*, 10 Okla. 32.

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from the decision and award of the county commissioners of said county granting to the plaintiffs dollars damages for the location and establishment of a public highway over and across the lands of said plaintiffs; that a warrant of said county, duly and legally made and executed by said county, was tendered to said plaintiffs, in the sum of dollars, in payment of said damages, before this case was appealed to the district court, and said warrant remained in the office of the county clerk of said county, subject to the order of said plaintiffs; that the said plaintiffs refused to accept the same and prosecuted their appeal to a final judgment in this court; that said warrant was at all times subject to the order and disposition of said plaintiffs, from the time of its execution and tender to the plaintiffs up to the verdict and judgment upon appeal to this court; that the plaintiffs, upon the trial of this case upon appeal to this court, recovered a judgment for dollars and no more.⁴⁵

1056. MOTION TO QUASH PANEL OF PETIT JURORS.

Comes now the plaintiff, by its attorney, and objects to the panel of petit jurors drawn for the term, 19.., of the district court of county, for the following reasons, to-wit:

1. The panel was selected on the basis of the total vote of county cast at the general election in 19.., which was, whereas the panel should have been selected on the basis of the general election of 19.., held in of said year, the total of which vote was The following table shows the jurors as drawn and as they should have been drawn, which shows that the jurors are not distributed among the several precincts as nearly as may be, as required by section 658 of Civil Procedure:

(Here follows table of jurors as drawn.)

2. One M. O. was called to fill a vacancy in regular panel caused by absence of regular juror; he having been a member of the regular panel within two years prior to this time and not eligible as a juror; and further, that the sheriff

⁴⁵ Form in *Teagarden v. Board of Comm'rs of Linn Co.*, 49 Kan. 146.

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failed to summon C. O. C., of P. precinct, through a mistake of the name, the name being S. O. C. instead of C. O. C.; that P. precinct is not represented by the number of jurors to which it is entitled. The aforesaid panel does not constitute a legal jury within the meaning of the statute for the reasons aforesaid, and the plaintiff objects to going to trial at this time and moves to quash the panel.

Affidavit.⁴⁶

1057. MOTION TO BE MADE A PARTY DEFENDANT IN EJECTMENT SUIT.

Now comes A. B. and moves the court to be made a party defendant to the above entitled cause, for the reason that he, the said A. B., is the real party in interest and is the sole owner and entitled to the possession of the premises described in plaintiff's petition filed herein.

1058. MOTION FOR SECURITY FOR COSTS.

Now comes C. D., the defendant herein, and moves the court to make an order on the plaintiff to give security for costs in the above entitled cause for the reasons (set forth reasons).

1059. MOTION TO AMEND RECORD.

Comes G. M. (plaintiff or defendant) and moves the court to amend the record of this court, as follows:

1. To show at page of that on the day of, 19..., this court adjourned until the day of, 19..., instead of, 19..., as now appears.
2. Etc.

1060. NOTICE OF *LIS PENDENS* (NEBRASKA).

(Title and venue.)

To Whom It May Concern:

Take notice that on the day of, 19..., an ac-

⁴⁶ Form in *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139.

A motion to quash panel of jurors must be verified positively; it is not sufficient on mere belief. *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139.

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tion was commenced in the court of county, State of, in which action was plaintiff and and were defendants; that said action is returnable to the term, 19.., of the court of the county of and State of; that the purpose of said action is to set aside certain alleged fraudulent deeds made by the party as follows: (here set out the particular deeds which it is sought to have set aside) that said cause of action and deeds referred to affect the following described real estate, located in the county of and State of:

(Here describe property.)⁴⁷

1061. NOTICE OF *LIS PENDENS* IN CASE OF FORECLOSURE OF MORTGAGE (NEBRASKA).

(Title and venue.)

To Whom It May Concern:

Take notice that on the day of, 19.., an action was commenced in the court of county, State of, in which action was plaintiff and and were defendants; that said action is returnable to the term, 19.., of the court of the county of and State of; that the purpose of said suit is to foreclose a certain mortgage made and executed by on the day of, 19.., to and recorded in book at page, in the office in the county of, on the day of, 19.., to secure the payment of notes therein described payable in the amount of dollars, and by the terms of said mortgage the following described real estate was therein conveyed (here describe the real estate).⁴⁸

⁴⁷ Statutory provision of State of Nebraska. Cob. Ann. Stat. Neb. 1911, sec. 1086.

Oklahoma and Kansas. In Oklahoma and Kansas the filing of the petition in a suit in the circuit court acts as notice of *lis pendens*. Comp. Laws of Okla. 1909, sec. 5621; Gen. Stat. of Kans. 1909, sec. 5679; *Marshall v. Shepard*, 23 Kan. (321) 226.

⁴⁸ If the action is for foreclosure of mortgage the notice must contain the date of the mortgage, the parties thereto, the time and place of recording same. Cob. Ann. Stat. Neb. 1911, sec. 1086.

CHAPTER CXIV

APPEARANCES, WITHDRAWALS, STIPULATIONS, AGREEMENTS, ETC.

- 1062. Voluntary entry of appearance by defendant.
- 1063. Voluntary entry of appearance of one defendant.
- 1064. Entry of appearance of attorney.
- 1065. Entry of appearance of attorney by leave of court.
- 1066. Waiver of service, and authorizing attorney to enter appearance.
- 1067. Withdrawal of attorney by leave of court.
- 1068. Stipulation for change of venue.
- 1069. Stipulation for continuance.
- 1070. Stipulation for dismissal.
- 1071. Waiver of jury trial.
- 1072. Agreed statement of facts.
- 1073. Same—Another form.
- 1074. Agreed case.

1062. VOLUNTARY ENTRY OF APPEARANCE BY DEFENDANT.

(Venue—court—title of case.)

Now comes A. B., the defendant herein, and voluntarily enters his appearance in the above entitled cause.

1063. VOLUNTARY ENTRY OF APPEARANCE OF ONE DEFENDANT.

Now comes T. G., one of the defendants herein, and voluntarily enters his appearance in the above entitled cause.

1064. ENTRY OF APPEARANCE OF ATTORNEY.

Now comes C. D. and enters his appearance as attorney of record for E. F., the defendant in the above entitled cause.

1065. ENTRY OF APPEARANCE OF ATTORNEY BY LEAVE OF COURT.

Now comes G. H., and by leave of court first had and obtained, enters his appearance as attorney of record for I. J., defendant in the above entitled cause.

STIPULATIONS, AGREEMENTS, ETC.

1066. WAIVER OF SERVICE, AND AUTHORIZING ATTORNEY TO ENTER APPEARANCE.

We hereby waive the issuance and service of a summons upon us in this cause, and enter our appearance to same, hereby authorizing and empowering J. N. C. to act for us as our attorney in making this appearance a matter of record.

This, 19...

W. C. Z.

J. D. B.

1067. WITHDRAWAL OF ATTORNEY BY LEAVE OF COURT.

Now comes L. M., and by leave of court first had and obtained, withdraws from the above entitled cause as attorney of record for N. O., the plaintiff (or the defendant, as the case may be).

1068. STIPULATION FOR CHANGE OF VENUE.

It is hereby agreed and stipulated by and between the above named parties that this cause may be removed to the court of

1069. STIPULATION FOR CONTINUANCE.

It is hereby agreed and stipulated by and between the parties to the above entitled cause that this case may be continued at the cost of to the term of this court.

1070. STIPULATION FOR DISMISSAL.

It is hereby agreed and stipulated by and between the parties hereto that the above entitled suit shall be dismissed at the cost of plaintiff (or defendant).

1071. WAIVER OF JURY TRIAL.

It is stipulated and agreed by and between the parties hereto that trial by jury of the above entitled cause is hereby waived, and that said cause shall be tried by the court.

.....

Attorney for plaintiff.

.....

Attorney for defendant.

APPEARANCES, WITHDRAWALS.

1072. AGREED STATEMENT OF FACTS.

It is agreed by and between the parties hereto that the following are the facts of this case, and it is further agreed that this case shall be submitted on these facts and no other, namely,—(set out facts).¹

1073. SAME—ANOTHER FORM.

It is agreed by the parties above named that the following facts shall be taken as evidence in the above entitled cause, subject to the objection on the part of either party hereto for relevancy, competency and materiality: (set out facts).

1074. AGREED CASE.

It is hereby stipulated and agreed by and between the plaintiff and defendant herein, as follows: (set out facts clearly by paragraphs).

The question submitted to the court for decision is whether, under the facts herein set forth, etc. If so, then there should be judgment for plaintiff for the sum of dollars; if not, then there should be judgment for defendant.

State of,
County of, } ss.

....., plaintiff, and, defendant, being duly sworn on their respective oaths, state that the controversy set out in the foregoing statement exists between the parties therein mentioned, and that the proceedings are had in good faith, to determine the rights of the parties.

Sworn to, etc.²

¹ Court will not consider any fact agreed upon unless it affects some one of the issues tendered by the pleadings. *Comm'r's of Marion Co. v. Comm'r's of Harvey Co.*, 26 Kan. 181.

² Facts may be agreed upon. *Comp. Laws Okla.* 1909, sec. 6051; *Cob. Ann. Stat. Neb.* 1911, sec. 1572; *Gen. Stat. Kan.* 1909, sec. 6144.

Affidavit must be filed stating that the proceeding is in good faith. *State ex rel. v. Babcock*, 22 Neb. 614.

Court has no right to receive evidence outside of the facts agreed upon. *Gray v. Crockett*, 30 Kan. 138, 148.

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